# MANUAL OF THE CONSTITUTIONAL HISTORY OF CANADA

BOURINOT

# A MANUAL

OF THE

# CONSTITUTIONAL HISTORY OF CANADA

## FROM THE EARLIEST PERIOD TO 1901

INCLUDING THE BRITISH NORTH AMERICA ACT OF 1867, A DIGEST OF JUDICIAL DECISIONS ON IMPORTANT QUESTIONS OF LEGISLATIVE JURISDICTION, AND OBSERVATIONS ON THE WORKING OF PARLIAMENTARY GOVERNMENT

BY

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*NEW EDITION, REVISED AND ENLARGED*

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# PREFATORY NOTE.

The present edition of this book, first published in 1888, has been thoroughly revised in order to make it as useful as possible to those students in our universities and colleges who are now required to consult it in their studies of our constitutional history. I have completed to date the summary of those judicial decisions which have so far laid down important principles for the interpretation of a constitution which has evoked much learned argument in our courts and legislatures. In the performance of this task I have not attempted to include any opinions or comments of my own, but have simply condensed the essential points of each decision in the language of the learned judges, as far as practicable, and left the student to seek further elucidation in the works of such conscientious commentators as Mr. Lefroy. I have also added a chapter on the practical operation of the principles of parliamentary government in the Dominion, for the information of those readers who have neither time nor opportunity to study the elaborate treatises of Todd, May, and Anson. The text of the British North America Act, and of the amending imperial statutes, is given in full at the end of the book. A complete list of the many authorities, cited in the text of this volume, will also be found useful to students who wish to investigate our constitutional history in the most thorough manner.

JNO. GEO. BOURINOT.

HOUSE OF COMMONS, OTTAWA.
Dominion Day, 1901.

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# CHAPTER I.

## A HISTORICAL REVIEW OF

## *PARLIAMENTARY INSTITUTIONS IN CANADA.*

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**I. Canada under the French Régime.**—The history of parliamentary institutions in Canada only commences towards the close of the eighteenth century. Whilst the country remained in the possession of France, the inhabitants were never represented in legislative assemblies and never exercised any control over their purely local affairs by frequent town meetings. In this respect they occupied a position very different from that of the English colonists in America. The conspicuous features of the New England system of government were the wide diffusion of popular power and the almost entire independence of the parent state in matters of purely provincial interest and importance. All the freemen were accustomed to assemble regularly in township meetings, and take part in their debates and proceedings. The town, in fact, was "the political unit," and was accordingly represented in the legislature of the colony. Legislative assemblies,[1] indeed, were the rule in all the old colonies of England on this continent—even in proprietary governments like that of Maryland. On the other hand, in the French colony, a legislative system was never enjoyed by the inhabitants.

[1] Story on the Constitution of the United States (4th ed. Cooley), i. 113, 114, 193 n.; Bourinot's Local Gov. in Canada, in Johns Hopkins Uni. Stud. in Hist. and Pol. S., Baltimore, 1887.

The first government which was established by Samuel Champlain, the founder of Quebec, was invested with large authority.[1] For over half a century, whilst the country was practically under the control of trading corporations, the governor exercised all the powers of civil and military government necessary for the security and peace of the colony. Though he had the assistance of a council, he was under no obligation whatever to follow its advice, on all occasions. After some years' experience of conditions of government which made the early governors almost absolute, Louis XIV., on the advice of Colbert, determined to effect an entire change in the administration of colonial affairs. From 1663, the government of Canada was made more conformable to the requirements of a larger population. But in all essential features the government resembled that of a French province. The governor and intendant were at the head of affairs and reported directly to the king.[2] Of these two high functionaries, the governor was the superior in position; he commanded the troops, made treaties with the Indians, and took precedence on all occasions of state. The intendant came next to him in rank, and, by virtue of his large powers, exercised great influence in the colony. He presided at the council, and had control of all expenditures of public money. His commission also empowered him to exercise judicial functions, and in certain cases to issue ordinances having the force of law whenever it might be necessary.[3]

When the king reorganized the government of Canada, in

[1] Garneau i. 87 (Bell's Translation). The "Instructions" in the early commissions ordered: "And according as affairs occur, you shall, in person, with the advice of prudent and capable persons, prescribe—subject to our good pleasure—all laws, statutes and ordinances; in so far as they may conform to our own, in regard to such things and concernments as are not provided for by these presents."

[2] The governor was styled in his commission, "Gouverneur et Lieutenant-Général en Canada, Acadie, Isle de Terre-Neuve, et autres pays de la France Septentrionale;" and the intendant, "Intendant de la Justice, Police et Finance du Canada," etc. Doutre et Lareau, Histoire du Droit Canadien, 130.

[3] See Commissions of Intendants in *Edits et Ordonnances*, iii.

the month of April, 1663, he decreed the establishment of a supreme council at Quebec.[1] This body, afterwards called the superior council, consisted of the governor, the bishop, the intendant and five councillors, subsequently increased to seven,[2] and eventually to twelve.[3] This council exercised legislative, executive and judicial powers. It issued decrees for the civil, commercial, and financial government of the colony, and gave judgment in civil and criminal causes according to the royal ordinances and the *coutume de Paris*, besides exercising the function of registration borrowed from the Parliament of Paris. An attorney-general sat in the council, which was also empowered to establish subordinate courts throughout the colony. From the decisions of the intendant or the council there was no appeal except to the king in his council of state. Local governors were appointed at Montreal and Three Rivers, but their authority was very limited; for they were forbidden to fine or imprison any person without obtaining the necessary order from Quebec. Neither the *seigneur* nor the *habitant* had practically any voice whatever in the government; and the royal governor called out the militia whenever he saw fit, and placed over it what officers he pleased. Public meetings for any purpose were jealously restricted, even when it was necessary to make parish or market regulations.[4] No semblance of municipal government

[1] *Edit de création du conseil souverain de Québec*, *Ib.* i. 37.

[2] In 1675, when the king confirmed the decree of 1663 (*Ib.* i. 83), and revoked the charter of the West India Co., to which exclusive trading privileges had been conceded in 1664. Doutre et Lareau, Histoire du Droit Canadien, 118, 184.

[3] In 1703. The councillors were rarely changed, and usually held office for life. They were eventually chosen by the king from the inhabitants of the colony on the recommendation of the governor and intendant. The West India Co. made nominations for some years. The first council, after the edict of 1663, was selected by the governor and bishop. Parkman, Old Régime, 135-6.

[4] Il ne laisse pas d'être de très grande conséquence de ne pas laisser la liberté au peuple de dire son sentiment. (Meules au Ministre, 1685.) Even "meetings held by parishioners under the eye of the curé to estimate the cost of a new church seem to have required a special license from the intendant." (Parkman, The Old Régime in Canada, 280.) "Not merely was the Canadian

was allowed in the town and village communities. Provision had been made in the constitution of 1663 for the election of certain municipal officers called syndics, to note any infraction of public rights in the large communities; but, after a few futile attempts to elect such functionaries, the government threw every obstacle in the way of anything like a municipal system, and the people finally were left without any control whatever over their most trivial local affairs.[1]

The bishop exercised from the very outset large influence in public affairs, and the Roman Catholic Church became established by the decrees and ordinances of the government. The parish was organized as a district for local as well as ecclesiastical purposes.* Tithes for the support of the clergy were imposed and regulated by the ordinances of the government.[2] All education was under the control of the church and its numerous religious societies.[3] The very social fabric itself rested on feudal principles modified to suit the condition of things in a new country. The *habitant* held his lands on a tenure which, however favourable to settlement, was based on the acknowledgment of his dependence on the *seigneur*. But at the same time, the lord of the manor, and the settler on his estate, were on equal footing to all intents and purposes as

colonist allowed no voice in the government of his province or the choice of his rulers, but he was not even permitted to associate with his neighbour for the regulation of those municipal affairs which the central authority neglected under the pretext of managing." Lord Durham's R., 10.

[1] Doutre et Lareau, Histoire du Droit Canadien, 138. The regulations of 1647 show that such officers existed in Quebec, Montreal and Three Rivers, but they had ceased to be appointed by 1661. The first elections held in 1663 were allowed to miscarry, and from that time forward, says Garneau, "There was no further question of free municipal government in Canada, so long as French dominion endured, although a nominal syndicate existed for a short time after that now under review." Garneau, i. 189-90.

[2] Tithes were first established by Bishop Laval in favour of Quebec Seminary on March 26, 1663. An ordinance of Governor de Tracy, in 1677, made the tithes obligatory. See Lareau, Histoire du Droit Canadien, i. 463-467. A royal ordinance respecting tithes and cures was issued in 1679. *Edits et Ord.*, i. 232.

[3] Bourinot's Canada under British Rule, p. 33.

respects any real influence in the administration of the public affairs of the colony. The very name of parliament had to the French colonist none of that significance it had to the Englishman, whether living in the parent state or in its dependencies. The word in French was applied only to a body whose ordinary functions were of a judicial character, and whose very decrees bore the impress continually of royal dictation. In Canada as in France, absolutism and centralization were the principles on which the government was conducted. The king administered public affairs through the governor and intendant, who reported to him as frequently as it was possible in those times of slow communication between the parent state and the colony.[1] The country prospered or languished, according as the king was able or disposed to take any interest in its affairs; but even under the most favourable circumstances, it was impossible that Canada could make any decided political or material progress with a system of government which centralized all real authority several thousand miles distant.[2]

**II. Government from 1760 to 1774.**—Canada came into the possession of Great Britain by the terms of capitulation signed on the 8th of September, 1760.[3] By these terms Great Britain bound herself to allow the French Canadians the free exercise of their religion; and certain specified fraternities, and all communities of *religieuses* were guaranteed the possession of their goods, constitutions and privileges, but a similar favour was denied to the Jesuits, Franciscans or Recollets, and Sulpicians, until the king should be consulted

[1] "The whole system of administration centered in the king, who, to borrow the formula of his edicts, 'in the fullness of our power and our certain knowledge,' was supposed to direct the whole machine, from its highest functions to its pettiest intervention in private affairs." Parkman, Old Régime, 285-6.

[2] For accounts of system of government in Canada till the conquest, see Garneau, i. book iii., chap. iii. Parkman's Old Régime in Canada, chap. xvi. Bourinot's Canada under British Rule, chap. i. sec. 5. Reports of Attorney-General Thurlow (1773), and Solicitor-General Wedderburne (1772), cited by Christie, i. chap. ii.

[3] Atty.-Gen. Thurlow; Christie's Hist., i. 48. Garneau, ii. 70.

on the subject. The same reservation was made with respect to the parochial clergy's tithes.[1] These terms were all included in the treaty of Paris, signed on the 10th of February, 1763, by which France ceded to Great Britain, Canada, and all the Laurentian isles, except St. Pierre and Miquelon, insignificant islands off the southern coast of Newfoundland, which were required for the prosecution of the French fisheries. In this treaty Great Britain bound herself to allow the Canadians the free exercise of their religion, "as far as the laws of Great Britain permit,"[2] but no reference was made in the document to the legal system that was to prevail throughout the conquered country.[3]

For nearly four years after the conquest, the government of Canada was entrusted to military chiefs, stationed at Quebec, Montreal and Three Rivers, the headquarters of the three departments into which General Amherst divided the country.[4] Military councils were established to administer law, though, as a rule, the people did not resort to such tribunals, but settled their difficulties among themselves. In 1763, the king, George III., issued a proclamation establishing four new governments, of which Quebec was one.[5] Labrador, from St. John's River to Hudson's Bay, Anticosti, and the Magdalen Islands, were placed under the jurisdiction of Newfoundland, and the islands of St. John (or Prince Edward Island, as it was afterwards called), and Cape Breton (Ile Royale), with

[1] For text of terms of capitulation of Montreal, see Houston's Constitutional Documents of Canada, 32-60.

[2] These words, "as far as the laws of Great Britain permit," appear only in Art. IV. of the treaty of Paris, and not in the terms of capitulation. They are also found in the Instructions given in 1763 to Governor Murray. Doutre et Lareau, pp. 328, 560.

[3] Atty.-Gen. Thurlow; Christie, i. 48. For text of the treaty of Paris, see Houston, 61-65.

[4] These three divisions corresponded to the old ones under the French régime. General Murray was stationed at Quebec; General Gage at Montreal; Colonel Burton at Three Rivers. Garneau, ii. 82.

[5] The others were East Florida, West Florida, and Grenada. The boundaries of the several governments are set forth in the proclamation.

the smaller islands adjacent thereto, were added to the government of Nova Scotia. Express power was given to the governors, in the letters-patent by which these governments were constituted, to summon general assemblies, with the advice and consent of his Majesty's council, "in such manner and form as was usual in those colonies and provinces which were under the king's immediate government." Authority was also given to the governors, with the consent of the councils, and the representatives of the people, to make laws and ordinances for the peace, welfare and good government of the colonies in question. The governors were also empowered to establish, with the consent of the councils, courts of judicature and public justice, for the hearing of civil and criminal causes, according to law and equity, and, as near as may be, agreeable to the laws of England, with the right of appeal in all civil cases to the privy council.[1] General Murray,[2] who was appointed governor of Quebec on the 21st November, 1763, was commanded to execute his office according to his commission and instructions, under his Majesty's signet and sign manual, or by his Majesty's order-in-council, and according to laws made with the advice and consent of the council and assembly—the latter to be summoned as soon as the situation and circumstances of the province should admit. The persons duly elected by the majority of the freeholders of the respective parishes and places were required, before taking their seats in the proposed assemblies, to take the oaths of allegiance and supremacy, and the declaration against tran-

[1] Proclamation of 7th October, 1763. Atty.-Gen. Thurlow's Report; Christie, i. 49-50. Houston, 67-69. In the debates on the Quebec Bill, the vagueness of this proclamation was sharply criticised, and no one appears to have been willing to assume the responsibility of having framed it for the king. Atty.-Gen. Thurlow acknowledged that "it certainly gave no order whatever with respect to the constitution of Canada; it certainly was not a finished composition, etc." Cavendish's Debates, 29.

[2] Sir Jeffery Amherst was in reality the first, and Gen. Murray the second, governor-general of Canada. Garneau, ii. 87; *supra*, 6.

substantiation.[1] All laws, in conformity with the letters-patent, were to be transmitted in three months to the king for disallowance or approval. The governor was to have a negative voice and the power of adjourning, proroguing and dissolving all general assemblies.[2] Not the least important feature of the proclamation was the fact that it established equitable methods of dealing with the Indians within the limits of British sovereignty. No person was allowed to purchase lands directly from the Indians. The government itself thenceforth could alone give a legal title to Indian lands, which must, in the first place, be secured by treaty with their Indian claimants. This was the beginning of a policy which has obtained for England the confidence of the Indian nations from Cape Breton to Vancouver.[3]

No assembly ever met in Canada, as the French population were unwilling to take the test oath,[4] and the government of the province was carried on solely by the governor-general, with the assistance of an executive council, composed in the first instance of the two lieutenant-governors of Montreal and Three Rivers, the chief-justice, the surveyor-general of customs, and eight others chosen from the leading residents in the colony.[5] From 1763 to 1774 the province remained in a very

[1] The oaths of allegiance, supremacy, and abjuration were formerly required to be taken by every member in the English Commons under various statutes. 30 Car. II., st. 2, c. 1, required members of both houses to subscribe a declaration against transubstantiation, the adoration of the Virgin, and the sacrifice of the mass. Taswell-Langmead, Const. Hist., 656, 657. By 29 and 30 Vict., c. 19, and 31 and 32 Vict., c. 72, a single oath was prescribed for members of all religious denominations; May, 156. By the Bill of Rights, and the later Act of Settlement, the sovereign of Great Britain, on succeeding to the throne, is required to make a declaration against transubstantiation at the first meeting of parliament or at the coronation. Anson's Law and Custom of the Constitution, Part II., 65. Since the accession of Edward VII. to the throne the Roman Catholics of the Empire have made a remonstrance against the continuance of an act legalized under very different conditions. See debate in Can. Commons, March 1-2, 1901.

[2] Atty.-Gen. Thurlow, Christie, i. 50-1.

[3] See Kingsford's Hist. of C., v. 127.

[4] It was convoked *pro formâ*, but never assembled. Garneau, ii. 92, 108.

[5] Garneau, ii. 87-8. Only one native French Canadian was admitted into this council.

unsettled state, chiefly on account of the uncertainty that prevailed as to the laws actually in force. The "new subjects," or French Canadians, contended that justice, so far as they were concerned, should be administered in accordance with their ancient customs and usages, by which for a long series of years their civil rights and property had been regulated, and which they also maintained were secured to them by the terms of the capitulation and the subsequent treaty. On the other hand, "the old," or English subjects, argued from the proclamation of 1763 that it was his Majesty's intention at once to abolish the old established jurisprudence of the country, and to establish English law in its place, even with respect to the titles of lands, and the modes of descent, alienation and settlement.[1]

**III. The Quebec Act of 1774.**—The province of Quebec remained for eleven years under the unsatisfactory system of government established by the proclamation of 1763. In 1774, Parliament intervened for the first time in Canadian affairs and made important constitutional changes. The previous constitution had been created by letters-patent under the great seal of Great Britain, in the exercise of an unquestionable and undisputed prerogative of the Crown. The colonial institutions of the old possessions of Great Britain, now known as the United States of America, had their origin in the same way.[2] But in 1774, a system of government was

[1] Atty.-Gen. Thurlow, in Christie, i. 51-63; also Report of Atty.-Gen. Yorke, and Sol.-Gen. De Grey, 14th April, 1766, quoted by Thurlow, 55. The latter able lawyer expressed himself very forcibly as to the rights of the French Canadians: "They seem to have been strictly entitled by the *jus gentium* to their property, as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents by tenure or otherwise, and also to their personal liberty. * * * * It seems a necessary consequence that all those laws by which that property was created, defined, and secured, must be continued to them. To introduce any other, as Mr. Yorke and Mr. De Grey emphatically expressed it, tends to confound and subvert rights, instead of supporting them." See Bourinot's Canada under British Rule, pp. 42-45.

[2] Report of Committee of Council, 1st May, 1849, app. A., vol. ii. Earl Grey's Colonial Policy.

granted to Canada by the express authority of parliament.[1] This constitution was known as the Quebec Act, and greatly extended the boundaries of the province of Quebec, as defined in the proclamation of 1763. On one side, the province extended to the frontiers of New England, Pennsylvania, New York province, the Ohio, and the left bank of the Mississippi; on the other, to the Hudson Bay Territory. Labrador, and the islands annexed to Newfoundland by the proclamation of 1763, were made part of the province of Quebec.

The bill was introduced in the House of Lords on the 2nd of May, 1774, by the Earl of Dartmouth, then colonial secretary of state, and passed that body without opposition. Much discussion, however, followed the bill in its passage through the House of Commons, and on its return to the Lords, the Earl of Chatham opposed it "as a most cruel, oppressive, and odious measure, tearing up justice and every good principle by the roots." The opposition in the province was among the British inhabitants, who sent over a petition for its repeal or amendment. Their principal grievance was that it substituted the laws and usages of Canada for English law.[2] The act of 1774 was exceedingly unpopular in England and in the English-speaking colonies, then at the commencement of the Revolution.[3] Parliament, however, appears to have been influenced by a desire to adjust the government of

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[1] 14 Geo. III., c. 83, "making more effectual provision for the government of the province of Quebec, in North America." The bill, on the motion for its passage, with amendments, in the House of Commons, was carried by 56 yeas to 20 nays. In the House of Lords it had a majority of 19; Contents 26, Non. Con. 7. Cav. Deb., iv. 296.

[2] Cav. Deb., preface, iii-vi.

[3] The American Congress, in an address to the people of Great Britain, September 5, 1774, declared the act to be unjust, unconstitutional, and most dangerous and destructive of American rights. (Christie, i. 8-9) In 1779, Mr. Masères, formerly attorney-general of Quebec, stated that "it had not only offended the inhabitants of the province, but alarmed all the English provinces in America." Cav. Deb., v. See report for 1890 on Canadian Archives, by Douglas Brymner, xx-xxii.

the province so as to conciliate the majority of the people.[1] In the royal speech closing the session, the law was characterized as "founded on the plainest principles of justice and humanity, and would have the best effect in quieting the minds and promoting the happiness of our Canadian subjects."[2]

The new constitution came into force in October, 1774. The act sets forth among the reasons for legislation that the provisions made by the proclamation of 1763 were "inapplicable to the state and circumstances of the said province, the inhabitants whereof amounted at the conquest, to about sixty-five thousand persons professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected, governed, and ordered for a long series of years, from the first establishment of the province." Consequently, it is provided that Roman Catholics should be no longer obliged to take the test oath, but only the oath of allegiance. The government of the province was entrusted to a governor and a legislative council, appointed by the Crown, inasmuch as it was "inexpedient to call an assembly."[3] This council was to comprise not more than twenty-three, and not less than seventeen members, and had the power, with the consent of the governor or commander-in-chief for the time being, to make ordinances for the peace, welfare, and good government of the province. They had no authority, however, to lay on any taxes or duties except such as the inhabitants of any town or district might be authorized to assess or levy within its precincts for roads and ordinary local services.[4]

[1] Garneau, ii. 125, who represents French Canadian views in his history, acknowledges that "the law of 1774 tended to reconcile the Canadians to British rule."

[2] Cav. Deb., iv.

[3] Fox contended for a representative assembly, but Lord North expressed his opinion that it was not wise for a Protestant government to delegate its powers to a Catholic assembly. Cav. Deb. 246-8.

[4] A supplementary bill, passed in the session of 1774 (14 Geo. III., c. 88),

No ordinance could be passed, except by a majority of the council, and every one had to be transmitted within six months after its enactment to his Majesty for approval or disallowance. It was also enacted that in all matters of controversy, relative to property and civil rights, recourse should be had to the French civil procedure, whilst the criminal law of England should obtain to the exclusion of every other criminal code which might have prevailed before 1764. Both the civil and the criminal law might be modified and amended by ordinances of the governor and legislative council. Owners of lands, however, might bequeath their property by will, to be executed either according to the laws of Canada or the forms prescribed by the laws of England. The act also expressly gave the French Canadians additional assurance that they would be secured in the rights guaranteed to them by the terms of the capitulation and the subsequent treaty. Roman Catholics were permitted to observe their religion with perfect freedom, and their clergy were to enjoy their "accustomed dues and rights" with respect to such persons as professed that creed. Consequently, the Roman Catholic population of Canada were relieved of their disabilities many years before people of the same belief in Great Britain and Ireland received similar privileges.[1]

The new constitution was inaugurated by Major-General Carleton, afterwards Lord Dorchester,[2] who nominated a legislative council of twenty-three members, of whom eight were Roman Catholics.[3] This body sat, as a rule, with closed

provided a revenue for defraying expenses of administration of justice and civil government by imposing duties on spirits and molasses, in place of old French colonial custom dues. The deficiency in the expenses was supplied from the imperial treasury. Christie, i. 1-2. Houston, 97.

[1] For Quebec Act, see Houston, 90-96. Consult Bourinot's Canada under British Rule, chap. ii., sec. 1.

[2] He was appointed governor of Canada in 1772; in 1776 created a knight of the bath; in 1786 raised to the peerage with the above title. Caven. Deb., 100, *note*.

[3] Several were public functionaries. Garneau, ii. 166.

doors;[1] both languages were employed in the debates, and the ordinances agreed to were drawn up in French and English. It was not able to sit regularly, on account of the government being fully occupied with the defence of the province during the progress of the American war of independence.[2] In 1776, the governor-general called to his assistance a privy council of five members, in accordance with the royal instructions accompanying his commission. This advisory, not legislative, body, was composed of the lieutenant-governor and four members of the legislative council.[3]

**IV. Constitutional Act, 1791.**—The constitution of 1774 remained in force until the 20th of December, 1791, when two provinces were established in Canada, and a more liberal system of government was given to each section. Whilst the American war of independence was in progress, the French Canadian people remained faithful to their allegiance, and resisted all the efforts of the Americans to induce them to revolt against England.[4] One very important result of the war was the immigration into British North America of a large body of people who had remained faithful to British connection throughout the struggle in the old colonies, and were destined, with their descendants, to exercise a great influence on the material and political development of Canada. Some forty thousand loyalists, as near as can be ascertained, came into the British American provinces. The majority

[1] Councillors were required to take the following oath :—"I swear to keep close and secret all such matters as shall be treated, debated and resolved in Council, without disclosing or publishing the same or any part thereof." Doutre et Lareau, 719.

[2] It did not meet during 1776. Garneau, ii. 165.

[3] Garneau, ii. 169. Exception was taken to the legality of this body by Chief-Justice Livius, who contended that the law of 1774 only gave authority to establish a legislative council. He was sustained by the law officers of the Crown in England. Kingsford's Hist. of Canada, vi. 466-7.

[4] In 1775, General Washington addressed a proclamation to the French Canadians; Baron D'Estaing, commander of the French fleet, did the same in 1788. All such efforts were ineffectual. Speech of Sir G. E. Cartier, Confed. Deb., 57-60.

migrated to the maritime colony of Nova Scotia, and founded the province of New Brunswick; but a large number, some ten thousand probably, established themselves in the country known as Upper Canada.[1] By 1790, the total population of Canada had reached, probably, over one hundred and sixty thousand souls.[2] In 1788, the governor-general created five judicial districts in Upper and Lower Canada, in order to meet the requirements of the new population.[3] It had by this time become the opinion of English statesmen that it would be advisable to make further constitutional changes in the province, more consonant with the wishes of its large population, of which the British element now formed a very important part. The question of representative government agitated the province from 1783 to 1790, and petitions and memorials, embodying the conflicting views of the political parties into which the people were divided, were presented to the home government, which decided to deal with the question, after receiving a report from Lord Dorchester, who had been authorized to make full inquiry into the state of the colony. In the session of 1791, George III. sent a message to the House of Commons declaring that it would be for the benefit of the people of the province if two distinct governments were

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[1] Introduction to Canada Census Statistics of 1871, vol. iv., xxxviii.-xlii. Canada under British Rule, chap. iii., sec. 73.

[2] The population of New France in 1760 was estimated at between 60,000 and 70,000, a considerable emigration to France having taken place after the conquest. In 1775, the population of all Canada was estimated at 90,000. In 1790, Nova Scotia had probably 30,000 inhabitants; 1793, Cape Breton, 2,000; St. John or Prince Edward Island, 4,500 in 1796; New Brunswick had 35,000 by 1806.—(Census Statistics of 1871, vol. iv.) Others estimate the population of Canada in 1790 at only 135,000. Garneau, ii. 205.

[3] The district in the province of Quebec was called Gaspé; the other four in the upper section were called Luneburg, Mecklenburg, Nassau and Hesse, after great houses in Germany, allied to the royal family of England. Luneburg extended from the Ottawa to the Gananoque; Mecklenburg, from the Gananoque to the Trent; Nassau, from the Trent to Long Point, on Lake Erie; and Hesse embraced the rest of Canada to the St. Clair. Doutre et Lareau, Histoire du Droit Canadien, 744. Bourinot's Local Government in Canada, 30. Luneburg was the German term, first used.

established therein under the names of Lower Canada and Upper Canada.[1] The result was the passage through parliament of the Constitutional Act of 1791,[2] which was introduced in the House of Commons by Mr. Pitt. This act created much discussion in Parliament and in Canada, where the principal opposition came from the British inhabitants of Lower Canada.[3] Much jealousy already existed between the two races, who were to be still more divided from each other in the course of the operation of the new constitution. The authors of the new scheme of government, however, were of opinion that the division of Canada into two provinces would have the effect of creating harmony, since the French would be left in the majority in one section, and the British in the other.[4] The Quebec Act, it was generally admitted, had not promoted the prosperity or happiness of the people. Great uncertainty still existed as to the laws actually in force under the act. Although it had been sixteen years in operation, neither the judges nor the bar clearly understood the character of the laws of Canada previous to the conquest. No certainty

[1] March 4, 1791. Christie, i. 68-69.

[2] 31 Geo. III., c. 31. "In Upper and Lower Canada the three estates of governor, council and assembly were established, not by the Crown (as in the case of the old colonies), but by the express authority of Parliament. This deviation from the general usage was unavoidable, because it was judged right to impart to the Roman Catholic population of the Canadas privileges which, in the year 1791, the Crown could not have legally conferred upon them. There is also reason to believe that the settlement of the Canadian constitution, not by a grant from the Crown merely, but in virtue of a positive statute, was regarded by the American loyalists as an important guarantee for the secure enjoyment of their political franchises." Rep. of Com. of Council, 1st May, 1849; Earl Grey's Colonial Policy, ii., app. A.

[3] Mr. Adam Lymburner, a Quebec merchant, was heard on the 23rd March, 1791, at the bar of the House of Commons against the bill. Christie, i. 74-114.

[4] Mr. Pitt said: "I hope this separation will put an end to the competition between the old French inhabitants and the new settlers from Britain and the British colonies." Edmund Burke was of opinion that "to attempt to amalgamate two populations composed of races of men diverse in languages, laws, and customs, was a complete absurdity." For debates on bill see Eng. Hans. Parl. Hist. vol. 28, p. 1271; vol. 29, pp. 104, 359-459, 655. Garneau, ii. 198-203. Christie, i. 66-114.

existed in any matters of litigation except in the case of the possession, transmission, or alienation of landed property, where the custom of Paris was quite clear. The Canadian courts sometimes admitted, and at other times rejected, French law, without explaining the grounds of their determination. In not a few cases, the judges were confessedly ignorant of French Canadian jurisprudence.[1]

The Constitutional Act of 1791 established in each province a legislative council and assembly, with power to make laws. The legislative council was to be appointed by the king for life—in Upper Canada to consist of not less than seven, and in Lower Canada of not less than fifteen members. Members of the council and assembly must be twenty-one years old, and either natural-born subjects or naturalized by act of parliament, or subjects of the Crown by the conquest and cession of Canada. The sovereign might, if he thought proper, annex hereditary titles of honour to the right of being summoned to the legislative council in either province.[2] The speaker of the council was to be appointed by the governor-general. The whole number of members in the assembly of Upper Canada was not to be less than sixteen; in Lower Canada not less than fifty—to be chosen by a majority of votes in either case. The limits of districts returning representatives, and the number of representatives to each, were fixed by the governor-general. The county members were elected by owners of lands in freehold, or in fief or roture, to the value of forty

[1] Christie, i. 67. Mr. Lymburner, *Ib.* 77-79; Report on Administration of Justice, 1787. Garneau, ii. 189-90.

[2] No titles were ever conferred under the authority of the act. Colonel Pepperrell was the first American colonist who was made a baronet for his services in the capture of Louisbourg, 1745. Such distinctions were very rare in Canada during the years previous to Confederation. Chief Justices James Stuart and J. B. Robinson were both made baronets in the early times of Canada. But, since 1867, the Queen has conferred special marks of royal favour on Canadians. (See Todd Parl. Govt. in B. C, 2nd ed., 322.) The order of St. Michael and St. George has been expressly enlarged with a view of giving an imperial recognition of the services of distinguished colonists in different parts of the Empire. The Crown alone can confer titles.

shillings sterling a year over and above all rents and charges payable out of the same. Members for the towns and townships were elected by persons having a dwelling house and lot of ground therein of the yearly value of £5 sterling or upwards, or who, having resided in the town for twelve months previous to the issue of the election writ, should have *bonâ fide* paid one year's rent for the dwelling-house in which he shall have resided, at the rate of £10 sterling a year or upwards. No legislative councillor or clergyman could be elected to the assembly in either province. The governor was authorized to fix the time and place of holding the meeting of the legislature and to prorogue and dissolve it whenever he deemed either course expedient; but it was also provided that the legislature was to be called together once at least every year, and that each assembly should continue for four years, unless it should be sooner dissolved by the governor. It was in the power of the governor to withhold as well as give the royal assent to all bills, and to reserve such as he should think fit for the signification of the pleasure of the Crown. The British parliament reserved to itself the right of providing regulations, imposing, levying and collecting duties, for the regulation of navigation and commerce to be carried on between the two provinces, or between either of them and any other part of the British dominions or any foreign country. Parliament also reserved the power of appointing or directing the payment of duties, but at the same time left the exclusive apportionment of all moneys levied in this way to the legislature, which could apply them to such public uses as it might deem expedient. It was also provided in the new constitution that all public functionaries, including the governor-general, should be appointed by the Crown, and removable at the royal pleasure. The free exercise of the Roman Catholic religion was guaranteed permanently. The king was to have the right to set apart, for the use of the Protestant clergy in the colony, a seventh part of all uncleared Crown lands. The governors might also be empowered to erect parsonages and endow them, and to present incumbents or ministers of the

Church of England, and whilst power was given to the provincial legislatures to amend the provisions respecting allotments for the support of the Protestant clergy, all bills of such a nature could not be assented to until thirty days after they had been laid before both houses of the imperial parliament.[1] The governor and executive council were to remain a court of appeals until the legislatures of the provinces might make other provisions.[2] The right of bequeathing property, real and personal, was to be absolute and unrestricted. All lands to be granted in Upper Canada were to be in free and common socage, as well as in Lower Canada, when the grantee desired it. English criminal law was to obtain in both provinces.[3]

A proclamation was issued on the 18th of November, 1791.[4] On the 7th of May, 1792, Lower Canada was divided into fifty electoral districts, returning altogether fifty members. The legislature of that province was called together by proclamation on the 30th of October, and met for the first time accordingly at Quebec on the 17th of December, 1792. The legislative council was composed of fifteen members.[5] The government of Upper Canada was organized at Kingston, in July, 1792, when the members of the executive and legislative

[1] The intent of these provisions was to preserve the rights and interests of the established Church of England in both provinces from invasion by their respective legislatures. Christie, i. 122.

[2] An ordinance of the province of Quebec had so constituted the executive. See Doutre et Lareau, 713.

[3] For Constitutional Act of 1791 and of supplementary Acts, see Houston, 112-148.

[4] By the lieutenant-governor, General Alured Clarke. The governor-general, Lord Dorchester, was absent in England. This proclamation set forth the division line between the provinces as stated in the order of council of the previous August—the Ottawa river being the line as far as Lake Temiscamingue. Christie, i. 124.

[5] Hon. W. Smith, chief justice, was appointed speaker of the legislative council of Lower Canada; J. A. Panet was elected speaker of the legislative assembly. See Christie, i. 126-8, where names of members of both houses are given. The legislature met for some years in the building known as the old Bishop's Palace, situated between the Grand Battery and Prescott Gate. See Hawkins's Pictures of Quebec.

council were sworn, and writs issued for the election of the assembly. The first meeting of the legislature of Upper Canada—with seven members in the legislative council and sixteen in the assembly—was held at Newark (the old name of Niagara) on the 17th day of September, 1792, and was formally opened by Lieutenant-Governor Simcoe.[1] Both legislatures, even in those early times of the provinces, assembled with the formalities that are observed at the opening of the imperial parliament.[2] The rules and orders adopted in each legislature were based, as far as practicable in so new a country, on the rules and usages of its British prototype.

The Constitutional Act of 1791 was framed with the avowed object of "assimilating the constitution of Canada to that of Great Britain, as nearly as the difference arising from the manners of the people, and from the present situation of the province, will admit."[3]

For some years after the inauguration of the new constitution, political matters proceeded with more or less harmony, but eventually a conflict arose between the governors and the representatives in the assembly, as well as between the latter

[1] Hon. W. Osgoode, chief justice, speaker of legislative council; W. Macdonnell, speaker of legislative assembly. The first meeting was in a rude frame house, about half a mile from the village—it was not unusual for the members to assemble in a tent. (Scadding's Toronto, 29. Bourinot's Canada under British Rule, pp. 93, 94.) The legislature of Upper Canada was removed to York, now Toronto, in 1797—that town having been founded and named by Governor Simcoe in 1794. (*Ib.* 101.) The provincial legislature met in a wooden building on what is now known as Parliament Street. Scadding's Toronto, 26-7.

[2] The Duke de la Rochefoucault-Liancourt, who was present at an "opening" in 1795, at Newark, gives a brief account of the ceremonial observed even amid the humble surroundings of the first parliament. See vol. ii. 88.

[3] Despatch of Lord Grenville to Lord Dorchester, 20th Oct., 1789, given in App. to Christie, vi. 16-24. Lt.-Governor Simcoe, in closing the first session of the legislature of Upper Canada, said that it was the desire of the imperial government to make the new constitutional system "an image and transcript of the British constitution" See Jour. of U. C., 1792; E. Com. P., 1839, vol. 33, p. 166

and the upper house, which kept the people in the different provinces, especially in Lower Canada, in a state of continual agitation. In Upper and Lower Canada the official class was arrayed, more or less, with the legislative council against the majority in the assembly. In Lower Canada the dispute was at last so aggravated as to prevent the harmonious operation of the constitution. The assembly was constantly fighting for the independence of parliament, and the exclusive control of the supplies and the civil list. The control of "the casual and territorial revenues" was a subject which provoked constant dispute between the crown officials and the assemblies in all the provinces. These revenues were not administered or appropriated by the legislature, but by the governors and their officers. At length, when the assemblies refused supplies, the executive government availed itself of these funds in order to make itself independent of the legislature, and the people through their representatives could not obtain those reforms which they desired, nor exercise that influence over officials which is essential to good government.[1] The governor dissolved the Quebec legislature with a frequency unparalleled in political history, and was personally drawn into the conflict. The majority in the assembly persistently advocated an elective legislative council, which would necessarily increase the influence of the French Canadians, and were too often intemperate in the expression of their opinions. Public officials were harassed by impeachments. The assembly's bills of a financial, as well as of a general character, were frequently rejected by the legislative council, and the disputes between the two branches of the legislature eventually rendered it impossible to pass any useful legislation. In this contest the two races were found arrayed against each other in the bitterest antagonism.[2] Appeals to the home government were

[1] Mr. W. Macdougall: Mercer v. Attorney-General for Ontario, Can. Sup. C. R., vol. v. 545-6.

[2] "I expected to find a contest between a government and a people; I found two nations warring in the bosom of a single state; I found a struggle, not of principles, but of races." Lord Durham's R., 7

very common, but no satisfactory results were attained as long as the constitution of 1791 remained in force. In Upper Canada the financial disputes, which were of so aggravated a character in the lower province, were more easily arranged; but nevertheless a great deal of irritation existed on account of the patronage and political influence being almost exclusively in the hands of the official class—derisively called a "family compact"—which practically controlled the executive and legislative councils.[1] Religious passion was also aroused on account of the large grants of public land to the Anglican Church (see *infra*, p. 32), which was all powerful in the government of the province.

In Nova Scotia the majority of the house of assembly were continually protesting against the composition of the executive and legislative councils, and the preponderance therein of certain interests which they conceived to be unfavourable to reform.[2] In New Brunswick, for years, the disputes between the executive and legislative powers were characterized by much acrimony, but eventually all the revenues of the province were conceded to the assembly, and the government became more harmonious from the moment it was confided to those who had the confidence of the majority in the house.[3] In Prince Edward Island the political difficulty arose from the land monopoly,[4] which was not to disappear in its entirety until the colony became a part of the confederation of Canada. But when we come to review the political condition of all the provinces, we find, as a rule, "representative government

[1] Lord Durham's R., 56-58.

[2] Mr. Young to Lord Durham, R., 75, and App. At the time of the border difficulties with Maine, the Nova Scotia legislature voted the necessary supplies. "Yet," said Mr. Howe, "those who voted the money, who were responsible to their constituents for its expenditure, and without whose consent (for they formed two-thirds of the Commons) a shilling could not have been drawn, had not a single man in the local cabinet, by whom it was to be spent, and by whom, in that trying emergency, the governor would be advised." Howe's Speeches and Public Letters, ii. 275.

[3] Lord Durham's R., 74.

[4] *Ibid.* 75.

coupled with an irresponsible executive, the same abuse of the powers of the representative bodies, owing to the anomaly of their position, aided by the want of good municipal institutions; and the same constant interference of the imperial administration in matters which should be left wholly to the provincial governments."[1] In Lower Canada, the descendants of the people who had never been allowed by France a voice in the administration of public affairs, had, after some years' experience of representative institutions, entered fully into their spirit and meaning, and could not now be satisfied with the workings of a political system which always ignored the wishes of the majority who really represented the people in the legislature. Consequently the discontent at last assumed so formidable a character that legislation was completely obstructed. Eventually this discontent culminated in the rebellion of 1837-38,[2] which inflicted much injury on the province, though happily it was confined to a very small part of the people. An attempt at a rebellion was also made in the upper province, but so unsuccessfully that the leaders were obliged to fly almost simultaneously with the rising of their followers;[3] though it was not for many months afterwards that the people ceased to feel the injurious effects of the agitation which the revolutionists and their emissaries endeavoured to keep up in the province. In the lower or maritime colonies, no disturbance occurred,[4] and the leaders of the popular party were among the first to assist the authorities in

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[1] Lord Durham's R., 74.

[2] For various accounts of this ill-advised rebellion in Lower Canada, and of the political controversies which preceded it, see Garneau, ii., chaps. ii. and iii., Book 16, pp. 418-96; Christie, vols. iv. and v.; Bourinot's Canada under British Rule, chap. vi.

[3] *Ib.* pp. 134, 153; Lindsey's Life of W. Lyon Mackenzie.

[4] "If in these provinces there is less formidable discontent and less obstruction to the regular course of government, it is because in them there has been recently a considerable departure from the ordinary course of the colonial system, and a nearer approach to sound constitutional practice." Lord Durham's R., 74.

their efforts to preserve the public tranquillity, and to express themselves emphatically in favour of British connection.[1]

The result of these disturbances in the upper provinces was another change in the constitution of the Canadas. The imperial government was called upon to intervene promptly in their affairs. Previous to the outbreak in Canada the government had sent out royal commissioners with instructions to inquire fully into the state of the province of Lower Canada, where the ruling party in the assembly had formulated their grievances in the shape of ninety-two resolutions, in which, among other things, they gave emphasis to their demand for an elective legislative council.[2] Lord Gosford came out in 1835 as governor-general and as head of the commission,[3] but the result tended only to intensify the discontent in the province. In 1837, Lord John Russell carried in the House of Commons, by a large majority, a series of resolutions, in which the demand for an elective legislative council and other radical changes was positively refused[4]—a rebellion almost immediately followed by rebellion. In this public emergency the Queen was called upon, on the 10th of February, 1838, to sanction a bill passed by the two houses, suspending the constitution, and making temporary provision for the government of Lower Canada. This act[5] was proclaimed in the Quebec Gazette on the 29th of March in the same year, and, in accordance with its provisions, Sir John Colborne appointed a special council,[6] which continued in office until the arrival of Lord Durham, who superseded Lord Gosford as governor-

[1] See remarks of Mr. Joseph Howe at a public meeting held at Halifax, N.S., in 1838. Howe's Letters and Speeches, i. 171, 179.

[2] Garneau, ii. 414. Journals, L. C., 1834, p. 310. Kingsford, ix. 529.

[3] Sir C. Grey and Sir G. Gipps were associated with Lord Gosford on the Commission. Kingsford, ix. 589.

[4] Eng. Com. J. [92] 305; Mirror of P., 1243-4.

[5] 1 and 2 Vict., c. 9; 2 and 3 Vict., c. 53.

[6] Christie, v. 51. The first ordinance suspended the *Habeas Corpus* and declared that the enactment of the council should take effect from date of passage.

general,[1] and was also entrusted with large powers as high commissioner[2] "for the adjustment of certain important affairs, affecting the provinces of Upper and Lower Canada." Immediately on Lord Durham's arrival he dissolved the special council just mentioned and appointed a new executive council.[3] This distinguished statesman continued at the head of affairs in the province from the last of May, 1838, until the 3rd of November in the same year, when he returned to England, where his ordinance of the 28th of June, sentencing certain British subjects in custody to transportation without a form of trial, and subjecting them and others, not in prison, to death in case of their return to the country without permission of the authorities, had been severely censured in and out of Parliament as not warranted by law.[4] So strong was the feeling in the Imperial Parliament on this question, that a bill was passed to indemnify all those who had issued or acted in enforcing an ordinance really enacted in the interest of peace and clemency.[5]

**V. Union Act, 1840.**—The immediate result of Lord Durham's mission was an elaborate report,[6] in which he fully reviewed the political difficulties of the provinces, and recommended imperial legislation with the view of remedying existing evils and strengthening British connection. The most important

[1] Christie, v. 47-9. Sir John Colborne was only administrator at this time.

[2] For instructions, in part, to Lord Durham and his remarks in the House of Lords on accepting the office, see Christie, v. 47-50.

[3] Christie, v. 150-51. After the departure of Lord Durham a "special council" was again appointed. *Ib.* 240.

[4] For debates on question, text of ordinance and accompanying proclamation, see Christie, v. 158-83.

[5] This bill was introduced by Lord Brougham, a personal enemy and the severest critic of Lord Durham's course in this matter. (1 and 2 Vict., c. 112.) In admitting the questionable character of the ordinance, Lord Durham's friends deprecated the attacks made against him, and showed that all his measures had been influenced by an anxious desire to pacify the dissensions in the provinces. Christie, v. 183-94. Bourinot's Canada under British Rule, pp. 136-138. Kingsford, x. 143, *et seq.*

[6] Officially communicated to Parliament, 11th Feb., 1839.

recommendation in the report was to the effect that "no time should be lost in proposing to Parliament a bill for restoring the union of the Canadas under one legislature, and reconstructing them as one province." On no point did he dwell more strongly than on the absolute necessity that existed for entrusting the government to the hands of those in whom the representative body had confidence.[1] He also proposed that the Crown should give up its revenues, except those derived from land sales, in exchange for an adequate civil list, that the independence of the judges should be secured, and that municipal institutions should be established without delay, "as a matter of vital importance." The first immediate result of these suggestions was the presentation to the Imperial Parliament, on the 3rd of May, 1839, of the royal message,[2] recommending a union of the Canadas. In the month of June, in the same year, Lord John Russell introduced a bill to reunite the two provinces, but it was allowed, after its second reading, to lie over for that session of Parliament, in order that the matter might be fully considered in Canada, and more information obtained on the subject.[3] Mr. Poulett Thomson[4] was appointed governor-general with the avowed object of carry-

[1] "I know not how it is possible to secure harmony in any other way than by administering the government on those principles which have been found perfectly efficacious in Great Britain. I would not impair a single prerogative of the Crown; on the contrary, I believe that the interests of the people of these provinces require the protection of prerogatives which have not hitherto been exercised. But the Crown must, on the other hand, submit to the necessary consequences of representative institutions; and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence." Page 106 of R.

[2] Mr. Poulett Thomson's remarks to special council, 11th Nov., 1839. Christie, v. 316.

[3] Christie, v. 289-90. The opinion of the British Parliament was decidedly favourable to the bill.

[4] Mr. Thomson was a distinguished statesman and member of the Imperial Parliament, and of decidedly advanced views in politics. See Kingsford, x. 509, 510. Sir John Colborne was governor in the interval between Lord Durham's retirement and Mr. Thomson's appointment.

ing out the policy of the imperial government, and immediately after his arrival at Montreal in November, 1839, he called the special council together, and explained to them "the anxious desire felt by Parliament and the British people that a settlement of the questions relating to the Canadas should be speedily arrived at." The council passed an address in favour of a reunion of the provinces under one legislature, as a measure of indispensable and urgent necessity.[1] The governor-general, in the month of December, met the legislature of Upper Canada, and, after full consideration of the question, both branches passed addresses in favour of union, setting forth at the same time the terms which would be considered most acceptable to the province.[2]

It will be seen that the imperial government considered it necessary, as a matter of form, to obtain the consent of the legislature of Upper Canada, and of the special council of Lower Canada, before asking Parliament to reunite the two provinces. Accordingly, Lord John Russell, in the session of 1840, again brought forward his bill entitled, "An Act to reunite the provinces of Upper and Lower Canada, and for the government of Canada,"[3] which was assented to on the 23rd of July, but did not come into effect until the 10th of February in the following year, in accordance with a suspending clause to that effect.[4] The act provided for a legislative

[1] Special Coun. J., Nov. 11, 12, 13, 14. Christie, v. 316-22.

[2] Leg. Coun. J. (1839-40) 14, &c. Leg. Ass. J. (1839-40), 16, 57, 63, 66, 161, 164. Christie, v. 326-56. Previously, however, in 1838, a committee of the house of assembly of Upper Canada had declared itself in favour of the proposed union. Upp. Can. Ass. J. (1838), 282.

[3] 3 and 4 Vict., c. 35. The bill passed with hardly any opposition in the Commons, but it was opposed in the Lords by the Duke of Wellington, the Earl of Gosford, the Earl of Ellenborough, and others.

[4] Mr. Poulett Thomson, now created Lord Sydenham, issued his proclamation on February 5, 1841, and took the oath on that day as governor-general from Chief Justice Sir James Stuart at Government House in Montreal. Mr. Thomson's title was Baron Sydenham, of Sydenham in the County of Kent, and of Toronto in Canada. (Christie v. 357-8.) The first parliament of the united Canadas was held at Kingston, 14th June, 1841. In 1844 it was removed to Montreal (then a city of 40,000 souls), on address. Mr. Speaker

council of not less than twenty members, and for a legislative assembly in which each section of the united provinces would be represented by an equal number of members—that is to say, forty-two for each, or eighty-four in all. The speaker of the council was appointed by the Crown, and ten members, including the speaker, constituted a quorum. A majority of voices was to decide, and in case of an equality of votes, the speaker had a casting vote. A legislative councillor would vacate his seat by continuous absence for two consecutive sessions. The number of representatives allotted to each province could not be changed except with the concurrence of two-thirds of the members of each house. The quorum of the assembly was to be twenty, including the speaker. The speaker was elected by the majority, and was to have a casting vote in case of the votes being equal on a question. No person could be elected to the assembly unless he possessed a freehold of lands and tenements to the value of five hundred pounds sterling over and above all debts and mortgages. The English language alone was to be used in the legislative records.[1] A session of the legislature should be held once, at least, every year, and each legislative assembly was to have a duration of four years, unless sooner dissolved. Provision was made for a consolidated revenue fund, on which the first

Jameson and other Upper Canadian legislative councillors left their seats rather than agree to the vote for the change. The legislature remained at Montreal until the riots of 1849, on the occasion of the Rebellion Losses Bill, led to the adoption of the system, under which the legislature met alternately at Quebec and Toronto—the latter city being first chosen by Lord Elgin. An address to the Queen to select a permanent capital was agreed to in 1857, and Ottawa finally chosen. The Canadian parliament assembled for the first time on the 8th June, 1866, in the new edifice constructed in that city. The British North America Act, 1867, s. 16, made that city the political capital of the Dominion. Turcotte, 1st part, 71, 144; 2nd part, 119, 315-16.

[1] The address from the Upper Canada assembly prayed for the equal representation of each province, a permanent civil list, the use of the English language in all judicial and legislative records, as well as in the debates after a certain period, and that the public debt of the province be charged on the joint revenues of the united Canadas. These several propositions, except that respecting the French language, were recommended in the governor-general's messages. Christie, v. 334-48.

charges were expenses of collection, management, and receipt of revenues, interest of public debt, payment of the clergy, and civil list. The fund, once these payments were made, could be appropriated for the public service as the legislature might think proper. All votes, resolutions or bills involving the expenditure of public money were to be first recommended by the governor-general.[1]

The passage of the Union Act of 1840 was the commencement of a new era in the constitutional history of Canada, as well as of the other provinces. The statesmen of Great Britain had at last learned that the time had arrived for enlarging the sphere of self-government in the colonies of British North America; and, consequently, from 1840 we see them year by year making most liberal concessions, which would never have been thought of under the old system of restrictive colonial administration. The most valuable result was the admission of the all important principle that the ministry advising the governor should possess the confidence of the representatives of the people assembled in parliament. Lord Durham, in his report, had pointed out most forcibly the injurious consequences of the very opposite system which had so long prevailed in the provinces. His views had such influence on the minds of the statesmen then at the head of affairs, that Mr. Poulett Thomson (as he informed the legislature of Upper Canada), "received her Majesty's commands to administer the government of these provinces in accordance with the well-understood wishes and interests of the people."[2] Subsequently he communicated to the legislature of the united provinces two despatches from

[1] For Union Act and supplementary Acts, see Houston, 149-185.

[2] In answer to an address from the assembly, 13th December, 1839. (Christie, v. 353.) The views of the great body of Reformers (in Upper Canada) appear to have been limited, according to their favourite expression, to making the colonial constitution "an exact transcript" of that of Great Britain; and they only desired that the Crown should, in Upper Canada, as at home, entrust the administration of affairs to men possessing the confidence of the assembly. Lord Durham's R., 58.

Lord John Russell,[1] in which the governor-general was instructed, in order "to maintain the utmost possible harmony," to call to his counsels and to employ in the public service "those persons who, by their position and character, have obtained the general confidence and esteem of the inhabitants of the province." He wished it to be generally made known by the governor-general that thereafter certain heads of departments would be called upon "to retire from the public service as often as any sufficient motives of public policy might suggest the expediency of that measure."[2] During the first session subsequent to the message conveying these despatches to the legislature, the assembly agreed to certain resolutions which authoritatively expressed the views of the supporters of responsible government. It was emphatically laid down, as the very essence of the principle, that "in order to preserve between the different branches of the provincial parliament that harmony which is essential to the peace, welfare, and good government of the province, the chief advisers of the representative of the sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people, thus affording a guarantee that the well-understood wishes and interests of the people, which our gracious sovereign has declared shall be the rule of the provincial government, will, on all occasions, be faithfully represented and advocated."[3]

[1] Lord J. Russell was colonial secretary from 1839 to 1841; the office was afterwards held successively from 1841 to 1852 by Lord Stanley, Mr. Gladstone, and Earl Grey. So that all these eminent statesmen assisted in enlarging the sphere of self-government in the colonies. Todd's Parl. Gov. in B. C., 26.

[2] Can. Ass. J. (1841), App. BB. These papers were in response to an address from the assembly of 5th August, 1841. The instructions to the governor-general repeated substantially the despatches on responsible government. Journal of Ass., 20th August, 1841.

[3] The resolutions, which were agreed to, were proposed by Mr. Harrison, then provincial secretary in the Draper-Ogden ministry, in amendment to others of the same purport, proposed by Mr. Baldwin. The resolution quoted in the text was carried by 56 yeas to 7 nays; the others passed without division. Jour. of Ass., 1841, pp. 480-82.

Nevertheless, during the six years that elapsed after the passage of this formal expression of the views of the large majority in the legislature, "responsible government" did not always obtain in the fullest sense of the phrase, and not a few misunderstandings arose between the governors and the supporters of the principle as to the manner in which it should be worked out.[1] In 1847, Lord Elgin was appointed governor-general, and received positive instructions "to act generally upon the advice of his executive council, and to receive as members of that body those persons who might be pointed out to him as entitled to do so by their possessing the confidence of the assembly."[2] No act of parliament was necessary to effect this important change; the insertion and alteration of a few paragraphs in the governor's instructions were sufficient.[3] By 1848 the provinces of Canada, Nova Scotia and New Brunswick[4] were in the full enjoyment of the system of self-government, which had been so long advocated by their ablest public men; and the results have proved eminently favourable to their political as well as material development.[5]

From 1841 to 1867, during which period the new constitution remained in force, many measures of a very important character were passed by the legislature. The independence of parliament was effectually secured, and judges and officials

[1] Especially during the administration of Lord Metcalfe (1843-45), who believed he could make appointments to office without taking the advice of his council. Dent's Canada since the Union, vol. i., chap. xvi.

[2] Grey, Colonial Policy, vol. i. 206-34; Adderley, 31. See also Colonial Reg., 57. Lord John Russell was premier, and Earl Grey, colonial secretary, when Lord Elgin was appointed. Todd, Parl. Gov. in B.C., 2nd ed., 73. Bourinot's Can. Studies in Comp. Pol., 18 *n*.

[3] Mr. Merivale, quoted in Creasy's Constitutions of the Britannic Empire, 389. Lord John Russell, in his instructions to Lord Sydenham, expressly stated that it was "impossible to reduce into the form of a positive enactment, a constitutional principle of this nature." Journals of Assembly, 1841, p. 392.

[4] Earl Grey was colonial secretary in 1848, when the system was fully inaugurated in the maritime provinces. E. Commons papers, 1847-48, vol. 42, pp. 51-88.

[5] For a short history of the beginnings of responsible government, see Bourinot's Canada under British Rule, c. vii.

prevented from sitting in either house. An elaborate system of municipal institutions was perfected in the course of a few years for Upper and Lower Canada. It had been proposed to make such a system a part of the constitution of 1840,[1] but the clauses on the subject were struck out of the bill during its passage in the House of Commons, on the ground that such a purely local matter should be left to the new legislature.[2] Lord Sydenham, who had very strong opinions on the subject, directed the attention of the legislature in the first session to the necessity of giving a more extended application to the principles of local self-government, which already prevailed in the province of Upper Canada; and the result was the introduction and passage of a measure in that direction.[3] At this time there was already in force an ordinance passed by the special council to establish a municipal system in Lower Canada—a measure which created much dissatisfaction in the province. Eventually the ordinance was revoked, and a system established in both provinces which met with general approval.[4] This measure demands special mention, even in this chapter, inasmuch as it has had a most valuable effect in educating the mass of the people in self-government, besides relieving the legislature of a large amount of business, which can be more satisfactorily disposed of in town or county organizations, as provided for by law. In fact, the municipal system of Canada lies at the very basis of its parliamentary institutions.

Among the distinguishing features of the important legislation of this period was the passage of a measure which may be properly noticed here, since it disposed of a vexatious

[1] Lord Durham so proposed it, R. 109. (Scrope's Life of Lord Sydenham, 194.) The address of the assembly of Upper Canada to the governor-general in 1840 called attention to the necessity of introducing a system into Lower Canada, in order to provide for local taxation. Christie, v. 347, 356.

[2] Bourinot's Loc. Gov. in Canada, 32.

[3] Introduced by Mr. Harrison; 4 & 5 Vict., c. 10.

[4] See Bourinot's Loc. Gov. in Canada; Turcotte, 1st Part, 97, 180; 2nd Part, 260, 384. Also, Cons. Stat. of Upper Canada, c. 54; of Lower Canada, c. 24.

question which had arisen out of the provisions of the Constitutional Act of 1791. It will be seen by reference to the summary given elsewhere of that act that it reserved certain lands for the support of a Protestant clergy. The Church of England always claimed the sole enjoyment of these lands, and in 1835, Sir John Colborne established a number of rectories which gave much offence to the other Protestant denominations, who had earnestly contended that these lands, under a strict interpretation of the law, belonged equally to all Protestants.[1] The Church of Scotland, however, was the only other religious body that ever received any advantage from these reserves. The Reform party in Upper Canada made this matter one of their principal grievances, and in 1839 the legislature passed an act to dispose of the question, but it failed to receive the approval of the imperial authorities. It was not until 1853 that the British Parliament recognized the right of the Canadian legislature to dispose of the clergy reserves on the condition that all vested rights were respected. In 1854, the Canadian legislature passed a measure making existing claims of the clergy a first charge on the funds, and dividing the balance among the several municipalities in the province according to population. Consequently, so far as the act of 1791 attempted to establish a connection between Church and State in Canada, it signally failed.[2]

Nor can the writer well leave out a brief reference to the abolition of the seigniorial tenure, after an existence of over two centuries, since the system deeply affected in many ways the social and political life of the French Canadian people. In the days of the French régime, this system had certain advantages in assisting settlement and promoting the comfort

[1] In fact, in 1840, the highest judicial authorities of England gave it as their opinion that the words "a Protestant clergy" in the act of 1791 included other clergy than those of the Church of England. Mirror of P., May 4, 1840

[2] See Lord Durham's R., 66, 83; Turcotte, ii., 137, 234; Cons. Stat. of Canada, c. 25. The measure of 1854 (18 Vict., c. 2) was in charge of Attorney-General (afterwards the Rt.-Hon. Sir John) Macdonald, then a member of the McNab-Morin administration. Leg. Ass. J. (1854-5) 193 *et seq.*

of the inhabitants; but, as Lower Canada became filled up by a large population, this relic of feudal times became altogether unsuited to the condition of the country, and it was finally decided to abolish it in the session of 1854.[1]

It was during this period that the Canadian legislature dealt with the civil service, on whose character and ability so much depends in the working of parliamentary institutions. During the time when responsible government had no existence in Canada, the legislature had virtually no control over public officials in the different provinces, but their appointment rested with the home government and the governors. In the appointments, Canadians were systematically ignored, or a selection made from particular classes, and the consequence was the creation of a bureaucracy which exercised a large influence in public affairs, and was at the same time independent of the popular branch. When self-government was entrusted to the provinces, the British authorities declared that they had "no wish to make the provinces the resource for patronage at home," but, on the contrary, were earnestly intent on "giving to the talent and character of leading persons in the colonies advantages similar to those which talent and character employed in the public service obtain in the United Kingdom."[2] But at the same time the British government, speaking through the official medium of the secretary of state for the colonies, always pressed on the Canadian authorities the necessity of giving permanency and stability to the public service, by retaining deserving public

[1] Mr. Drummond, attorney-general in the McNab-Morin administration, introduced the bill which became law, 18 Vict., c. 3. A bill in the session of 1853 had been thrown out by the legislative council. For historical account of this tenure see Garneau, i., chap. iii.; Parkman's Old Régime, chap. xv.; Turcotte, ii., 161, 203, 234; Cons. Stat. of Lower Canada, chap. xli. The number of fiefs at the time of the passage of the Act of 1854, was ascertained to be 220, possessed by 160 *seigneurs*, and about 72,000 *rentiers*. The entire superficial area of these properties comprised 12,822,503 acres, about one-half of which was found under rental. Garneau, i., 185. Report of Seigniorial Commission.

[2] Lord John Russell, 1839. Journals of Ass. U.C., App. B.B.

officers without reference to a change of administration.[1] The consequence of observing this valuable British principle has been to create a large body of public servants, on whose ability and intelligence depends, in a large measure, the easy working of the machinery of government. According as the sphere of government expanded, and the duties of administration became more complicated, it was found necessary to mature a system better adapted to the public exigencies. The first important measure in this direction was the bill of 1857, which has been followed by other legislation in the same direction of improving the machinery of administration.[2]

But in no respect have we more forcible evidence of the change in the colonial policy of the imperial government than in the amendments that were eventually made in the Union Act of 1840. All those measures of reform for which Canadians had been struggling during nearly half a century, were at last granted. The control of the public revenues and the civil list had been a matter of serious dispute for years between the colonies and the parent state; but, six years after the union, the legislature obtained complete authority over the civil list, with the sanction of the imperial government, which gave up every claim to dispose of provincial moneys.[3] About

[1] Lord John Russell, 1839. App. B.B., Jour. of Ass., 1841. Earl Grey to Lieut.-Governor Harvey of Nova Scotia, March 31, 1847. E. Com. P., 1847-48, vol. 42, p. 77. In Nova Scotia, the advice of the British government was never practically followed, and public officers were for years frequently changed to meet the necessities of politicians. See despatch of the Duke of Newcastle to Governor Gordon, Feb. 22, 1862, New Brunswick Jour., 1862, p. 192.

[2] Mr. Spence, when postmaster-general in the Taché-Macdonald administration, introduced the act of 1857, appointing permanent deputy heads and grades in the departments. 20 Vict., chap. 24. Cons. Stat. of Canada, c. 11. See Reports of Civil Service Commission, presented to Canadian Parliament, 1880-81 and 1882, in which the present condition of the service is fully set forth, Sess. Pap., No. 113 (1880-81), and Sess. Pap., No. 32 (1882). In 1882, Parliament passed an act to improve the efficiency of the service (45 Vict., c. 4), which has been amended by later legislation. See Rev. Stat. of Canada, c. 17.

[3] Ss. 50 to 57, respecting consolidated revenue fund and charges thereon, and with the schedules therein referred to, were repealed by the imperial act

the same time, the imperial government conceded to Canada the full control of the post-office, in accordance with the wishes of the people as expressed in the legislature.[1] The last tariff framed by the imperial parliament for the British possessions in North America was mentioned in the speech at the opening of the legislature in 1842,[2] and not long after that time, Canada found herself, as well as the other provinces, completely free from imperial interference in all matters affecting trade and commerce. In 1846, the British colonies in America were authorized by an imperial statute[3] to reduce or repeal by their own legislation duties imposed by imperial acts upon foreign goods imported from foreign countries into the colonies in question. Canada soon availed herself of this privilege, which was granted to her as the logical sequence of the free trade policy of Great Britain, and, from that time to the present, she has been enabled to legislate very freely with regard to her own commercial interests. In 1849, the imperial parliament, in response to addresses of the legislature, and memorials from boards of trade and merchants in Canada, repealed the navigation laws, and allowed the river St. Lawrence to be used by vessels of all nations. With the repeal of those old laws, Canadian trade and shipping received a valuable impulse.[4]

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10 and 11 Vict., c. 71, and the provincial act 9 Vict., c. 114, was brought into force, and duly provided a permanent civil list in place of that arranged by the imperial authorities. See Cons. Stat. of Canada, c. 10.

[1] See speech of Lord Elgin, sess. of 1847, Journal of Ass., p. 7; Can. Stat. 13 and 14 Vict., c. 17, s. 2, and Cons. Stat., c. 31, s. 2, under authority of imperial act, 12 and 13 Vict., c. 66.

[2] Ass. Jour., 1842, p. 3.

[3] Imp. Stat. 9 and 10 Vict., c. 94. Todd, Parl. Gov. in B. C., 222-224. See speech of Lord Elgin, 1847, Jour. 7, in which he refers to the power given to the colonial legislatures to repeal differential duties heretofore imposed by the colonies in favour of British produce. In response the legislature passed, 10 and 11 Vict., c. 30, the first measure necessary to meet "the altered state of our colonial relations with the mother country." Speech of Speaker of Assembly in presenting Supply Bill; Jour. 218.

[4] Leg. Ass. J. (1849), 43, 48, and App. C.; Imp. Act, 12 and 13 Vict., c. 29, s. 5. The memorandum of the Canadian government sets forth very clearly

No part of the constitution of 1840 gave greater offence to the French Canadian population than the clause restricting the use of the French language in the legislature. It was considered as a part of the policy, foreshadowed in Lord Durham's report,[1] to denationalize, if possible, the French Canadian province. The repeal of the clause in 1848 was one evidence of the harmonious operation of the union, and of the better feeling between the two sections of the population.[2] Still later, provision was made for an elective legislative council, so long and earnestly demanded by the old legislature of Lower Canada. In 1854 the imperial parliament passed, in response to an address of the legislative assembly, an act to empower the legislature to alter the constitution of the legislative council.[3] In 1856, the Canadian legislature passed a bill providing for an elective upper house; the province was divided into 48 electoral divisions, 24 for each section; twelve members were to be elected every two years; every councillor was to hold real estate to the value of $8,000 within his electoral district. The members were only to remain in the council for eight years, but could of course be re-elected. Ex-

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that since it was no longer the policy of the empire to give a preference to colonial products in the markets of the United Kingdom, no reason could possibly exist for monopolies and restrictions in favour of British shipping. See Bourinot's Canada under British Rule, pp. 87, 189, for allusions to Canada's unfortunate position after England's adoption of free trade, and the derangement of colonial trade that existed until the British navigation laws were repealed and foreign shipping allowed access to the St. Lawrence.

[1] "Without effecting the change so rapidly or so roughly as to shock the feelings and trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British government to establish an English population, with English laws and language, in this province, and to trust its government to none but a decidedly English legislature." P. 110, *et seq.*

[2] Imp. Stat. 11 and 12 Vict. c. 56, s. 1. See Houston, 175.

[3] Leg. Ass. J. (1353), 944; Imp. Act, 17 and 18 Vict., c. 118. In the course of the debate the Duke of Newcastle said: "The proper course to pursue was to legislate no more for the colonies than we could possibly help; indeed, he believed that the only legislation now required for the colonies consisted in undoing the bad legislation of former years." 134 E. Hans. (3) 159. See Imp. Stat. 22 and 23 Vict., c. 10, with reference to speaker of L. C.

isting members were allowed to retain their seats during their lives.[1] The speaker was appointed by the Crown from the council until 1862, when he was elected by the members from among their own number.[2] The first election of councillors under the new act took place in the summer of 1856.

**VI. Federal Union of the Provinces.**—The union between Upper and Lower Canada lasted until 1867, when the provinces of British North America were brought more closely together in a federation, and entered on a new era in their constitutional history. For many years previous to 1865, the administration of government in Canada had become surrounded with political difficulties of a very perplexing character. The union had not at first been viewed with favour by the majority of the French Canadians, who regarded it as a scheme to anglicize their province in the course of time. One of their grievances[3] was the fact that the act gave to each province the same representation in the legislature, though Lower Canada had in 1840 the greater population.[4] But the large immigration that flowed into Upper Canada for many years after the union soon gave the

[1] 19 and 20 Vict., c. 140; Cons. Stat. of Canada, c. 1. Mr. Cauchon, commissioner of crown lands, in the McNab-Taché administration, introduced the bill in the assembly.

[2] Can. Stat., 23 Vict., c. 3, repealed s. 26 of 19 and 20 Vict., c. 140. The act made also provision for supplying the place of the speaker in case of his being obliged to leave the chair from illness, etc. The first election took place in 1862, March 20, when Sir Allan McNab was chosen speaker.

[3] See address of Mr. Lafontaine (Turcotte, i. 60), in which he laid before the electors of Terrebonne his opinion as to the injustice of the Union Act: "L'union est un acte d'injustice et de despotisme en ce qu'elle nous est imposée sans notre consentement; en ce qu'elle prive le Bas-Canada du nombre légitime de ses représentants," etc.

[4] In 1839, Lord Durham gave the population of Upper Canada at 400,000, and that of Lower Canada at 600,000, of whom 450,000 were French. The census compiler of 1870 gives the population of Upper Canada in 1840, at 432,159; of Nova Scotia, in 1838, 202,575; of New Brunswick, in 1840, 156,162; of Assiniboia, 7,704; of Prince Edward Island, 47,042, in 1841. No figures are given for Lower Canada in 1840, but we find the number was 697,084, in 1844. The figures given by Lord Durham were as accurate as they could be made at the time.

preponderance of population to that province, where in the course of no long time a demand was made for a representation in the legislature according to the population. This demand was always strenuously resisted by the Lower Canadian representatives as unjust in view of the conditions under which they entered the union. The act itself afforded them sufficient protection, inasmuch as it embodied the proviso[1] that the governor could not assent to any bill of the legislature to alter the representation, unless it should have been passed with the concurrence of two-thirds of the members in each house. This clause was, however, suddenly repealed by the imperial act of 1854, empowering the legislature to alter the constitution of the legislative council, but no practical result ever followed in respect to the representation.[2]

It is interesting to note that one of the expedients by which it was hoped to arrange the political conflict between the two sections was the principle of a double majority. In the course of the first decade after the union, prominent public men laid it down as necessary to the harmonious operation of the constitution, that no administration ought to continue in power unless it was supported by a majority from each section of the united provinces.[3] As a matter of justice, it was urged, no measure touching the interests of a particular province should be passed, except with the consent of a

[1] 3 and 4 Vict., c. 35, s. 26. This clause was added to the bill by the British ministry to protect the French Canadian representation. Garneau, ii. 480.

[2] 17 and 18 Vict., c. 118, s. 5. The legislature had never asked an amendment in this direction, and the history of the repeal is a mystery. Garneau, in the edition of 1859, accused Sir Francis Hincks of having been the inspiring cause: but in a pamphlet published in 1877, the latter denied it most emphatically. In a subsequent edition, the onus of the change is placed on Mr. Henry John Boulton, a member of the legislative assembly, who was in England in 1854, about the same time as Sir F. Hincks. Garneau (ed. of 1882), iii., 275, 376. In 1854, the total number of representatives in the assembly was 130, 65 from each province. 16 Vict., c. 152.

[3] Messrs. Lafontaine and Caron to Mr. Draper, 1845. Turcotte, i., 262-10.

majority of its representatives.[1] The principle had more or less recognition in the government and legislature after 1848.[2] The very formation of the ministry, in which each province was equally represented, was an acknowledgment of the principle. But this acknowledgment, it was contended, was of no substantial value so long as the executive councillors taken from either section of the province did not possess the confidence of the majority of the representatives of that section in the assembly.[3] The principle, however specious in theory, was not at all practicable in legislation, and even its most strenuous supporters too often found that it could not be conveniently carried out in certain political crises. Its observance was always, to a great extent, a matter of political convenience, and it was at last abandoned even by its former advocates, who had urged it as the only means of doing justice to each province, and preserving the equality of representation provided in the constitution of 1840.[4]

The demands of the representatives from Upper Canada for additional representation were made so persistently that the time arrived when the administration of public affairs became surrounded with the gravest embarrassment. Parties at last were so equally balanced on account of the antagonism between the two sections, that the vote of one member might decide the fate of an administration, and the course of legisla-

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[1] Mr. Baldwin resigned in 1851 on a vote of the Upper Canada representatives adverse to the court of chancery, Turcotte, ii., 171-3. See remarks of Sir John A. Macdonald, Confederation Debates, 30.

[2] See resolution moved by Mr. (now Sir Hector) Langevin, 19th of May, 1858.

[3] See amendment moved by Mr. Cauchon to Mr. Thibaudeau's motion. Jour. Ass. (1858) 145, 876. Also *Ib.* (1856), 566.

[4] Mr. J. Sandfield Macdonald was always one of its warmest supporters, on the ground that it did away with the necessity of a change in the representation, as advocated by Mr. Brown and his followers from Upper Canada; but he virtually gave it up on the separate school question in 1863, when a majority of the representatives of his own province pronounced against a measure to which he was pledged as the head of the Macdonald-Sicotte Ministry. Turcotte, ii., 477-487. See Dent, ii., 429.

tion for a year or series of years. From the 21st of May, 1862, to the end of June, 1864, there were no less than five different ministries in charge of the public business.[1] Legislation, in fact, was at last practically at a dead-lock, and it became an absolute political necessity to arrive at a practical solution of difficulties, which appeared to assume more gravity with the progress of events. It was at this critical juncture of affairs that the leaders of the government and opposition, in the session of 1864, came to a mutual understanding, after the most mature consideration of the whole question. A coalition government was formed on the basis of a federal union of all the British American provinces, or of the two Canadas, in case of the failure of the larger scheme.[2] The union of the provinces had been discussed more than once in the legislatures of British North America since the appearance of Lord Durham's report, in which it was urged with great force that "it would enable the provinces to co-operate for all common purposes, and above all, it would form a great and powerful people, possessing the means of securing good and responsible government for itself, and which, under the protection of the British Empire, might, in some measure, counterbalance the preponderant and increasing influence of the United States on the American continent." Lord Durham even went so far as to recommend that the "bill should contain provisions by which any or all of the other North American colonies may, on the application of the legislature, be, with the consent of the two Canadas or their united legislature, admitted into the union on such terms as may be agreed on between them."[3] The expediency of a union was

[1] Sir J. A. Macdonald. Con. Deb., 26; Sir E. P. Taché, *Ib.* 9.

[2] Sir J. A. Macdonald, Con. Deb., 26-27. "The opposition and government leaders arranged a larger and a smaller scheme; if the larger failed, then they were to fall back upon the minor, which provided for a federation of the two sections of the province." Sir E. P. Taché, *Ib.* 9.

[3] Rep., 116-21. He preferred a legislative union. See for various schemes of union, Brymner's report on Canadian archives for 1890, pp. 23-24; and Bourinot's Canada under British Rule, chap. viii., sec. 1. The first resolution in favour of union was passed in 1854 by the Assembly of Nova Scotia. For

made a part of the programme of the Cartier-Macdonald government in 1858, and expressly referred to in the governor's speech at the close of the session;[1] but no practical result was ever reached until the political necessities of the provinces forced them to take up the question and bring it to a satisfactory issue. It was a happy coincidence that the legislatures of the lower provinces were about considering a maritime union at the time the leading statesmen of Canada had combined to mature a plan of settling their political difficulties. The Canadian ministry at once availed themselves of this fact to meet the maritime delegates at their convention in Charlottetown, and the result was the decision to consider the question of the larger union at Quebec. Accordingly, on the 10th of October, 1864, delegates from all the British North American provinces assembled in conference, in "the ancient capital," and after very ample deliberations during eighteen days, agreed to seventy-two resolutions, which form the basis of the Act of Union.[2] These resolutions were formally submitted to the legislature of Canada in January,

speeches of Hon. Messrs. Howe and Johnston on that occasion, see Bourinot's Builders of Nova Scotia, App. I and J.

[1]Conf. Deb., Sir G. E. Cartier, 53; Ass. J. (1858) 1043. See also Mr. Brown's speech (110-24), in which he claimed that the essence of the federation measure was found in the "joint authority" resolutions of a Reform Convention of 1859.

[2]For historical accounts of initiation of confederation see Gray, Confederation of Canada, vol. i.; Turcotte, ii., 518-59; Bourinot's Canada under British Rule, chap. viii.; Life of Sir John Macdonald, by Joseph Pope; Pope's Confederation Documents; Confederation Debates, 1865, especially speeches of Sir E. P. Taché, Sir J. A. Macdonald, Sir G. E. Cartier, Hon. Geo. Brown and Sir A. Campbell. Canada was represented by 12 delegates, 6 for each province, New Brunswick by 7, Nova Scotia by 5, P. E. Island by 7, and Newfoundland by 2; each province had a vote, and the convention sat with closed doors. The delegates: Canada, Sir E. P. Taché, Messrs. J. A. Macdonald, Cartier, Brown, Galt, Campbell, Chapais, McGee, Langevin, Mowat, McDougall and Cockburn. Nova Scotia, Messrs. Tupper, Henry, McCully, Archibald and Dickey. New Brunswick, Messrs. Tilley, Mitchell, Fisher, Steeves, Gray, Chandler and Johnson. P. E. Island, Messrs. Gray, Coles, Haviland, Palmer, Macdonald, Whalen and Pope. Newfoundland, Messrs. Shea and Carter.

1865, and after an elaborate debate which extended from the 3rd of February to the 14th of March, both houses agreed by very large majorities to an address to her Majesty praying her to submit a measure to the imperial parliament "for the purpose of uniting the provinces in accordance with the provisions of the Quebec resolutions."[1] Some time, however, had to elapse before the union could be consummated, in consequence of the strong opposition that very soon exhibited itself in the maritime provinces, more especially to the financial terms of the scheme. In New Brunswick, there were two general elections during 1865 and 1866, the latter of which resulted in the return of a legislature favourable to union, and finally to the adoption of the measure. The question was never submitted to the people at the polls in Nova Scotia, but the legislature eventually, after months of hesitation, agreed to the union, in view of the facts that it was strongly approved by the imperial government as in the interests of the Empire, that both Canada and New Brunswick had given their consent, and that it was proposed to make such changes in the terms as would be more favourable to the interests of the maritime provinces. The result of the action of the two provinces in question was another conference at London in the fall of 1866, when a few changes were made in the direction of maritime interests, chiefly in the financial terms, and without disturbing the important features of the Quebec resolutions, to which Canada had already pledged herself in the session of 1865.[2] The provinces of Canada, Nova Scotia

[1] The address was agreed to in the legislative council by 45 contents to 15 non-contents, Jour. (1865, 1st sess.), 130; in the assembly by 91 yeas to 33 nays, Jour., 192-3; Confed. Debates, 1865, p. 962. Sir E. P. Taché introduced the resolutions in the council; Atty.-Gen. (now Sir J. A.) Macdonald moved, and Atty.-Gen. (afterwards Sir) G. E. Cartier, seconded them in the assembly. Four members of the government went to England after the session of 1865, in reference to confederation, the cession of the Northwest, and other important questions. Jour. 1865, 2nd sess., 7-16; Bourinot's Canada under British Rule, pp. 210, 211.

[2] The Westminster Palace Conference was held in London, in December, 1866, and the result was the Union Act of 1867.

and New Brunswick, being at last in full accord, through the action of their respective legislatures, the plan of union was submitted on the 12th of February, 1867, to the imperial parliament, where it met with the warm support of the statesmen of all parties, and passed without amendment in the course of a few weeks, the royal assent being given on the 29th of March.[1] The new constitution came into force on the first of July, 1867, and the first parliament of the united provinces met on November of the same year[2]—the act requiring it to assemble not later than six months after the union.[3]

The confederation, as inaugurated in 1867, consisted only of the four provinces of Ontario, Quebec, Nova Scotia and New Brunswick.[4] By the 146th section of the Act of Union, provision was made for the admission of other colonies on addresses from the parliament of Canada, and from the respective legislatures of Newfoundland, Prince Edward Island, and British Columbia. Rupert's Land and the Northwest Territory might also at any time be admitted into the union on the address of the Canadian Parliament. The acquisition of the Northwest Territory had been for years the desire of the people of Canada, and was the subject of consultation with

[1] Imp. Act 30 and 31 Vict., c. 3. "An Act for the Union of Canada, Nova Scotia and New Brunswick, and the government thereof, and for purposes connected therewith." Lord Carnarvon, then secretary of state for the colonies, had charge of the measure in the Lords. Mr. Adderley, under-secretary, in the Commons. 185 E. Hans. 3 (Lords), 557, 804, 1011; (Commons) 1164, 1310, 1701.

[2] Her Majesty's proclamation, giving effect to the Union Act, was issued on the 22nd May, 1867, declaring that on and after the 1st July, 1867, the provinces of Canada, Nova Scotia and New Brunswick shall form and be one Dominion (see *infra*, p. 47, *n.*), under the name of Canada. The proclamation also contained names of first senators. Jour. House of Commons of Canada, v-vi. B. N. A. Act, 1867, ss. 3 and 25. Lord Monck was the first governor-general of the Dominion. Com. Jour. (1867-8), vii. Parliament met on the 7th November, and Hon. J. Cockburn was elected first speaker of the Commons. Hon. J. Cauchon was first speaker of the Senate.

[3] B. N. A. Act, ss. 19. (App. A *infra*).

[4] B. N. A. Act, ss. 5-7. (App. A *infra*).

the imperial government in 1865, when Canadian delegates went to England.[1] During the first session of the parliament of Canada, an address was adopted praying her Majesty to unite Rupert's Land and the Northwest Territory to the Dominion.[2] This address received a favourable response, but it was found necessary in the first place to obtain from the imperial parliament authority to transfer to Canada the territory in question. An act was passed in the month of July, 1868,[3] and in accordance with its provisions, negotiations took place between Canadian delegates and the Hudson's Bay Company for the surrender of the Northwest to the Dominion. An agreement was finally arrived at for the payment of £300,000 sterling on condition of the surrender of Rupert's Land to the Dominion—certain lands and privileges at the same time being reserved to the company. The terms were approved by the Canadian parliament in the session of 1869,[4] and an act at once passed for the temporary government of Rupert's Land and the Northwest Territories when united with Canada.[5] This act provided for a lieutenant-governor and council, to make provision for the administration of justice, and establish such laws and ordinances as might be necessary for peace and good government in the Northwest Territories. In the autumn of 1869 an order-in-council was passed for the appointment of a provisional lieutenant-governor of the territories, but the outbreak of an insurrection

[1] Leg. Ass. J., 1865, 2nd sess., 12-13. For papers on the subject of the acquisition of the territory, see Can. Sess. P., 1867-8, No. 19, and p. 367 of Journals.

[2] Can. Com. J. (1867-8), 67.

[3] Imp. Stat., 31 and 32 Vict., c. 105 (Can. Stat. for 1869), entitled "An act for enabling her Majesty to accept the surrender upon terms of the lands, privileges and rights of the governor and company of adventurers of England trading into Hudson's Bay, and for admitting the same into the Dominion of Canada."

[4] Can. Com. J. (1869), 149-56, in which the negotiations for the transfer are set forth in the address to her Majesty, accepting the terms of agreement for the surrender of the territory.

[5] Can. Stat. 32 and 33 Vict., c. 3.

among the French half-breeds prevented the former from exercising any executive functions.[1] It was not until the appearance of an armed force in the country in the fall of 1870 that the remnant of the insurgents fled from the territory; but, during the twelve months that preceded, the territories were formally transferred to the Dominion, and means taken by the Canadian authorities to arrange terms on which the people of the Red River might enter confederation. In the session of 1870, the Canadian parliament passed an act[2] to establish and provide for the government of Manitoba—a new province formed out of the Northwest Territory, to which was given representation in the Senate and House of Commons. Provision was also made for a local or provincial government on the same basis as existed in the older provinces. On the 30th of June, 1870, by an imperial order-in-council,[3] it was declared that after the 15th of July, 1870, the Northwest Territory and Rupert's Land should form part of the Dominion of Canada. The legislature of Manitoba was elected in the early part of 1871, and the provincial government regularly and peacefully established.[4] The members for the House of Commons took their seats in the session of the same year,[5]—the new senators in the session of 1872.[6] When I come to consider the provincial constitutions (*infra*, p. 71) I shall refer to the nature of the local government of Mani-

[1] Hon. W. McDougall. He was not to act in an official capacity until he was notified of the legal transfer of the country to Canada; but he appears to have disobeyed his instructions and attempted to set up a government by a *coup de main* before the formal transfer. See Bourinot's Canada under British Rule, pp. 227, 228. Pope's Life of Sir J. Macdonald, ii. 49-55.

[2] 33 Vict., c. 3. The limits of the province were enlarged in 1881; Can. Stat. 44 Vict., c. 14. See Rev. Stat. of Can., c. 47. Also Man. Stat., 44 Vict., c.c. 1, 12, 13, 14. Also, Imp. Stat. 34-35 Vict., c. 28.

[3] In accordance with s. 146, B. N. A. Act, 1867; Canada Stat. 1872, p. lxiii.

[4] Annual Register, 1878, pp. 18-19.

[5] Can. Com. J. (1871), 154, 221, 226. Only three members were returned; a new election in one constituency being requisite on account of a tie. Jour. 152.

[6] Sen. J. (1872), 18.

toba, as well as to the statutory provisions made by the Dominion parliament for the administration of the Northwest.

In accordance with addresses from the Canadian parliament, and the legislative council of British Columbia, that colony was formally admitted into the confederation by imperial order-in-council declaring that from and after the 20th of July, 1871, the colony should form part of the Dominion. The terms of union provided for representation in the Senate and House of Commons, and responsible government in the province, as well as for the construction of a transcontinental railway.[1] The members for the province took their seats in the Senate and House of Commons during the session of 1872.[2]

The province of P. E. Island had been represented in the Quebec conference of 1864, but, owing to the opposition that existed to the union for some years, it was not until the first session of 1873 that both the parliament of Canada and the legislature of the island passed addresses for the admission of the province into the confederation on certain conditions which included representation in the Senate and House of Commons, and the continuance of the local government on the same basis as in the other provinces.[3] A bill was also passed during the same session,—in anticipation of her Majesty's government taking the necessary steps to admit the island—providing that certain acts should come into force in the province as soon as it was united to Canada.[4] By an imperial order-in-council, it was declared that from and after the first of July, 1873, the colony should form part of the Dominion.[5] The members for the two houses took their seats for the first time during the second session of 1873.[6]

[1] Can. Com. J. (1871), 193-99; Parl. Deb., 1871. Can. Stat. for 1872, lxxxiv. Also as to preparatory steps, Can. Sess. Pap., No. 59, 1867-8, pp. 3-7.

[2] Sen. J. (1872) 18; Com. J. (1872) 4. The elections for the Commons were held in accordance with 34 Vict., c. 20.

[3] Can. Com. J. (1873) 401-403.

[4] 36 Vict., c. 40.

[5] Can. Stat. for 1873, p. ix.

[6] Sen. J., 1873, 2nd session, 9. Com. J., *Ib.* 2-4.

Newfoundland was also represented at the Quebec convention of 1864, but the general elections of 1865 resulted adversely to the union.[1] Subsequently the House of Commons, in the session of 1869, went into committee on certain resolutions providing for the admission of Newfoundland, and an address was passed in accordance therewith. The union was to take effect on such day as "her Majesty by order-in-council, on an address to that effect, in terms of the 146th section of the British North America Act, 1867, may direct;"[2] but the legislature of Newfoundland has so far shown no disposition to enter the confederation of Canada.

In response to an address of the parliament of Canada, in the session of 1878, an imperial order-in-council was passed on the 31st of July, 1880, declaring that "from and after the 1st of September, 1880, all British territories and possessions in North America, not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions shall (with the exception of the colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws, for the time being in force in the said Dominion, in so far as such laws may be applicable thereto." This order-in-council was considered necessary to remove doubts that existed regarding the northerly and north-easterly boundaries of the Northwest Territories and Rupert's Land, transferred to Canada by order of council of the 23rd June, 1870, and to place beyond question the right of Canada to all of British North America, with the exception of Newfoundland.[3]

**VII. Constitution of the General Government and Parliament.**—The Dominion[4] of Canada has, therefore, been extended since

[1] Turcotte, ii., 562.

[2] Can. Com. J. (1869), 221.

[3] Can. Com. J. (1878), 256-7; Can. Stat. 1881, p. ix., Order-in-Council, Can. Hans. (1878), 2386 (Mr. Mills).

[4] The title of Dominion (s. 3, B. N. A. Act of 1867) did not appear in the Quebec resolutions. The name was arranged at the conference held in London

1867 over all the British possessions between the Atlantic and Pacific oceans to the north of the United States—the territory under the jurisdiction of the Newfoundland government alone excepted. The seven provinces embraced within this vast area of territory are united in a federal union, the terms of which have been arranged on "principles just to the several provinces."

In order "to protect the diversified interests of the several provinces, and secure efficiency, harmony, and permanency in the working of the union," the system of government as set forth in the act of 1867, combines in the first place a general government, "charged with matters of common interest to the whole country," and local governments for each of the provinces, "charged with the control of local matters in their respective sections." With a view to the perpetuation of our connection with the mother country, and the promotion of the best interests of the people of these provinces," the constitution of the general government has been so framed as "to follow the model of the British constitution, so far as our circumstances will permit." Accordingly, "the executive authority or government" is vested in express terms in the "Sovereign of the United Kingdom of Great Britain and Ireland," and is administered "according to the well understood principles of the British constitution."[1]

The sovereign is represented in the Dominion by a governor-general, appointed by letters-patent under the great seal.

in 1866-7, when the union bill was finally drafted. "In the fourth draft of the bill the united provinces were designated the 'Kingdom of Canada,' but the phrase was struck out at the instigation of Lord Derby, then foreign minister, who feared it would wound the sensibilities of the United States." See Pope's Life of Sir J. Macdonald, i. 313; Pope's Confederation Documents, p. 177. This was not the first time the title was applied to Canada; we find in the address of the old colonies assembled at Philadelphia, 1774, strong objection was taken to the act of 1774, by which the "Dominion of Canada is to be so extended, modelled and governed." Christie, i. 9. The old commonwealth of Virginia was known as "the Old Dominion."

[1] These quotations are from the Quebec resolutions, Can. Leg. Ass. J. (1865), 202. Houston, 305. The preamble of the B. N. A. Act, 1867, declares, "with a constitution similar in principle to that of the United Kingdom."

His jurisdiction and powers are defined by the terms of his commission, and by the royal instructions which accompany the same.[1] He holds office during the pleasure of the Crown, but he may exercise his functions for at least six years from the time he has entered on his duties.[2] In all his communications with the imperial government, of which he is an officer, he addresses the secretary of state for the colonies, the constitutional avenue through which he must approach the sovereign.[3] His first duty, when he enters on his duties, is to take the necessary oaths of allegiance and office before the chief justice, or any other judge of the supreme court of the Dominion, and at the same time to cause his commission to be formally read.[4] In case of the demise of the Crown, and the accession of a king or queen, the governor-general must again take the oath of allegiance.[5]

In view of the larger measure of self-government conceded to the Dominion of Canada by the imperial legislation of 1867 —in itself but the natural sequence of the new colonial policy inaugurated in 1840—the letters-patent and instructions, which accompanied the commission given to the governor-general in 1878, have been modified and altered in certain material features. The measure of power now exercised by

[1] "A colonial governor is not a viceroy, but possesses only such authority as is given him by statutory enactment or by the terms of his commission and instructions from the Crown and its advisers." Musgrave *v.* Pulido, L. R. 5, App. Cas. 102; Todd's Parl. Gov. in B. C., 2nd ed., 35, 36.

[2] Colonial Reg., sec. 7. Col. Office List, 1889, p. 322. Todd, 90. Lord Lorne held the position for only five years. Lord Dufferin was appointed in the spring of 1872, and retired in the fall of 1878.

[3] Todd, 90; Col. Reg., sec. 165.

[4] Instructions to governor-general, Can. Sess. P. 1870, No. 14. The Marquis of Lorne was sworn in on the 25th of November, 1878, in the old Province Building, Halifax, by acting Chief Justice Ritchie. Annual Register for 1878, pp. 255-7. The oath of office is given in same account of ceremonies on that occasion.

[5] The Earl of Minto, February 23, 1901, on death of Queen Victoria and accession of King Edward VII. (see *Ottawa Citizen*, January 24, 1901, also *infra*, p. 186), who was proclaimed on the same day. *Can. Gazette Extra*, January 23, 1901.

the government and parliament of Canada is not merely "relatively greater than that now enjoyed by other colonies of the empire, but absolutely more than had been previously intrusted to Canada itself, during the administration of any former governor-general."[1] Without entering at length into this question, it is sufficient for present purposes to notice that the governor-general is authorized, among other things, to exercise all powers lawfully belonging to the Queen, with respect to the summoning, proroguing or dissolving of parliament;[2] to administer the oaths of allegiance and office;[3] to transmit to the imperial government copies of all laws assented to by him or reserved for the signification of the royal assent;[4] to administer the prerogative of pardon;[5] to appoint all ministers of state, judges, and other public officers, and to remove or suspend them for sufficient cause.[6] He may also appoint a deputy or deputies to exercise certain of his powers and functions.[7] He may not leave the Dominion upon any pretence whatsoever, without having first obtained permis-

[1] The modifications in these official instruments were the result of the mission of Mr. Blake, whilst minister of justice, to England in 1876. For full information on this subject, see Todd's Parl. Govt. in B. C., 2nd ed., 110-119, and Can. Sess. P. (1877), No. 13; also chap. on Public Bills (sec. 25) in Bourinot's Parl. Proced. For royal commission, letters-patent, and instructions to the Marquis of Lorne, Sess. P. (1879), No. 14; to Lord Monck, Sess. P. (1867-8), No. 22; also to Lord Dufferin, Can. Com. J. (1873), 85.

[2] Letters-patent, 1878, s. 5.

[3] Instructions, 1878, s. 2.

[4] *Ib.* s. 4.

[5] *Ib.* s. 5. By the amended instructions to the Marquis of Lorne (see Bourinot's Parl. Proced., App. E. 2), "The independent judgment and personal responsibility of the governor-general of Canada as an imperial officer are relied upon to decide finally, after consultation with his ministers, in all cases of imperial interest or which might directly affect any country or place outside of Canada; while he is at liberty to defer to the judgment of his ministers in all cases of merely local concern." Todd's Parl. Gov. in B.C., 2nd ed., 366.

[6] Letters-patent, s.s. 3, 4.

[7] *Ib.* s. 6; also B. N. Act, 1867, s. 14. This power is constantly exercised for the public convenience.

sion to do so through one of the principal secretaries of state.[1] In case of the death, incapacity, removal[2] or absence from Canada of the governor-general, his powers are vested in a lieutenant-governor or administrator appointed by the Queen, under the royal sign-manual; or, if no such appointment has been made, in the senior officer in command of the imperial troops in the Dominion. The administrator must also be formally sworn, as in the case of the governor-general.[3]

The senior executive councillor frequently administered the government in the absence of the governor-general before the union of 1840.[4] But whenever the lieutenant-governor was in the country, during the period in question, it was his duty to administer the government.[5] Since 1840, in the old province of Canada, and in the Dominion, the government has been administered in the absence of the governor-general by the senior officer in command of the imperial troops, in accordance with the letters-patent issued by the Crown.[6]

The constitution provides for the appointment of a council to aid and advise the representative of the sovereign in the

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[1] Instructions, s. 6.

[2] It is always competent for the imperial government to remove the governors of colonies, who are appointed during pleasure. See memorable case of Governor Darling of Victoria. Eng. Com. P. 1866, vol. l., 701; Todd's Parl. Gov. in B. C., 2nd ed., 136-140.

[3] Letters-patent, s. 7. *Canada Gazette*, December 30, 1882.

[4] In 1805, when Sir R. Shore Milnes, lieutenant-governor, went to England, Mr. Dunn assumed the government as "President and Commander-in-Chief;" he was one of the judges, and an executive councillor. Christie, i., 259. On the death of the Duke of Richmond, in 1819, the government devolved on Mr. Monk, as senior executive councillor. Christie, ii., 322.

[5] General Prescott, on departure of Lord Dorchester in 1796, Christie, i., 173; Sir R. Shore Milnes in 1799, *Ib.* 203; Sir F. Burton in 1824, *Ib.*, iii., 55. No such official now exists in the Dominion, the functions of the present lieutenant-governors being confined to the provinces to which they are appointed, in accordance with the B. N. A. Act, 1867.

[6] In 1841, Sir R. D. Jackson; 1845, Lord Cathcart; 1853, Lieut.-Gen. Rowan; 1857, Sir W. Eyre; 1860, Lieut.-Gen. Williams; 1865, Lieut.-Gen. Sir John Michel; 1874, Major-Gen. O'Grady Haly; 1878, 1881-2, and 1882-3, Sir P. L. McDougall. See *Canada Gazette*, Dec. 30, 1882.

government of Canada. This body is styled the Queen's Privy Council, and its members are chosen and may be removed at any time by the governor-general.[1] In accordance with the principles of the British constitutional system, this council represents the views of the majority of the people's representatives in parliament, and can only hold office as long as its members retain the confidence of the House of Commons. The name chosen for this important body has been borrowed from that ancient institution of England, which so long discharged the functions of advising the supreme executive of the kingdom in the government of the country.[2] Since the revolution of 1688, the privy council of England has had no longer the direction of public affairs, though it has still an existence as an honorary body, limited in numbers, only liable to be convened on special occasions, and only in theory an assembly of state advisers.[3] The system which has grown up in England since 1688, and which has obtained its most perfect realization during the past half century, now entrusts the practical discharge of the functions of government to a cabinet council, which is technically a committee of the privy council.[4] This cabinet is the ruling part of the ministry or administration. The term "ministry" properly includes all the ministers, but of these only a select number—usually about twelve, but liable to variation from time to time even in the same administration —constitute the inner council of the Crown and incur the higher responsibilities whilst they exercise the higher powers of government. The rest of the ministry, although closely connected with their brethren in the cabinet, occupy a secondary and subordinate position.[5] In Canada, however, there is

[1] B. N. A. Act, 1867, s. 11.

[2] Blackstone's Com. i., 229-234.

[3] Todd's Parl. Gov. in England, ii., 79.

[4] *Ib.*, ii., 179. The cabinet council or ministry who hold the principal offices of state, are first sworn in as privy councillors. May, ii., 79. Macaulay, c. 20.

[5] Taswell-Langmead, Cons. Hist., 707. And not only is the existence of the cabinet council unknown to the law, but the very names of the individuals

no such distinction; for the term "ministry" or "cabinet" has been always indifferently applied to those members of the privy council who have been summoned by the governor-general to aid and advise him in the government of the Dominion. In the session of 1887 an act was passed with the view of initiating the English system of having political heads of departments, who would commence their official career by holding certain offices which did not necessarily give them a position in the cabinet,[1] but the statute was repealed in 1897, after a short and unsatisfactory experience of the change.[2] The principles that prevail in the formation of a cabinet in England obtain in the case of an administration in Canada. Its members must have places in either houses of parliament, but the majority should, and necessarily do, sit in the commons.

In the old province of Canada, the cabinet was always known officially as the executive council.[3] In 1867, a new ministry of thirteen members was formed under the legal title of the privy council of Canada, in which it was found expedient to consider the claims of the several provinces of the Dominion to representation in the first federal cabinet. Accordingly, Ontario had five representatives in the privy council; Quebec, four, one of them a representative of the English section of the population; Nova Scotia, two; New Brunswick, two. The departments were reorganized, and new ones established, to meet the changed conditions of things. The privy council was composed of the following ministers:[4]

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who may comprise the same at any given period are never officially communicated to the public. The *London Gazette* announces that the Queen has been pleased to appoint certain privy councillors to fill certain high offices of state, but the fact of their having been called to seats in the cabinet council is not formally promulgated. Todd, ii., 181.

[1] Remarks of Sir J. A. Macdonald on the establishment of a department of trade and commerce, Com. Hans. [1887], 862, 863.

[2] See *infra*, 56, 57.

[3] Can. Cons. Stat., 168, 169.

[4] Annual Register, 1878, pp. 9-10; *Canada Gazette*. Their first salaries and designation are given in 31 Vict., c. 33, schedule. Salaries of ministers were subsequently increased by 36 Vict., c. 31, s. 2; 42 Vict., c. 7, s. 13 in *part*.

minister of justice and attorney-general,[1] minister of militia,[2] minister of customs,[3] minister of finance,[4] minister of public works,[5] minister of inland revenue,[6] minister of marine and fisheries,[7] postmaster-general,[8] minister of agriculture,[9] secretary of state of Canada,[10] receiver-general,[11] secretary of state for the provinces, president of the privy council.[12] In 1873, on a change of government, the number of ministers was increased to fourteen, two of them without portfolios,[13] but by subsequent rearrangement the number was reduced to thirteen as before, and Prince Edward Island, now a part of the confederation, was represented by one member.[14] On two occasions since 1878, the speaker of the senate received a seat in the council, though without portfolio,[15] and the number of members of government was consequently increased again to fourteen. Since 1867, several changes have taken place in the organization of the departments. In 1873, the office of secretary of state for the provinces was abolished, and a

[1] Functions of department set forth in 31 Vict., c. 39.

[2] 31 Vict., c. 40.

[3] 31 Vict., c. 43.

[4] 31 Vict., c. 5; 32-33 Vict., c. 4, and other acts relating to expenditures and revenues.

[5] 31 Vict., c. 12.

[6] 31 Vict., c. 49.

[7] 31 Vict., c. 57. In 1877, the management of certain piers, harbours and breakwaters, was transferred from the department of public works to that of marine and fisheries. 40 Vict., c. 17.

[8] 31 Vict., c. 10; 38 Vict., c. 7.

[9] 31 Vict., c. 53.

[10] 31 Vict., c. 42.

[11] The department of receiver-general was not provided for by special act, but his duties are defined and referred to in various acts. See 31 Vict., c. 5, etc.

[12] Neither of those offices was provided for by special act.

[13] Hon. E. Blake and Hon. R. W. Scott, Annual Register, 1878, p. 30.

[14] *Ib.* 30-31.

[15] Hon. Mr. Wilmot, in 1878; Hon. Mr. (afterwards Sir David) Macpherson, in 1880, on appointment of former to lieutenant-governorship of New Brunswick. See *Canada Gazette*, Nov. 9, 1878; *Ib.*, Feb. 12, 1880.

department of the interior organized, with the control and management of Indian affairs, Dominion lands, and some other matters previously entrusted to the secretary of state for Canada. The geological survey of Canada is also a department presided over at present by the minister of the interior; it is under the charge of a director, who must necessarily be a man of high scientific attainments.[1] Immigration was transferred in 1892 from the department of agriculture to the department of the interior.[2] The minister of the interior or the head of any other department appointed for this purpose by the governor-in-council, is the superintendent-general of Indian affairs.[3] The department of secretary of state for Canada remains in existence, but its functions embrace chiefly state correspondence, the preservation of records, and papers not specially transferred to other departments, the registration of all instruments of summons, proclamations, commissions, letters-patent, writs, and other documents issued under the great seal and requiring to be registered.[4] A department of public printing and stationery was organized in 1886, and placed under the management of the secretary of state.[5] In 1879, the office of receiver-general was abolished, and the duties assigned to the finance minister.[6] At the same time the department of public works was divided into two separate departments, presided over by two ministers—one designated minister of railways and canals; the other, minister of public works. These changes were rendered necessary in the departments of the interior and of public works; in the first place, by the transfer of the great Northwest Territory to the

[1] Rev. Stat. of Can., c.c. 22, 23; amen. by 53 Vict. (1890), c. 91, and 55-56, Vict. (1892), c. 16, which provides that the governor-in-council names a minister to preside from time to time over the survey.

[2] By order-in-council; see s. 5, c. 24, Stat. of 1872.

[3] Rev. Stat. of Can., c. 43. The premier, Sir J. A. Macdonald, while president of the council, held the office for some years. Parl. Companion for 1885.

[4] 31 Vict., c. 42; Rev. Stat. of Can., c. 26.

[5] 49 Vict., c. 22; Rev. Stat. of Can., c. 27.

[6] 42 Vict., c. 7; Rev. Stat. of Can., c. 28. Can. Hans. (1879), 1241.

Dominion, with its immense area of land and numerous tribes of Indians; and in the second place, by the very large additional amount of responsibility thrown on the other department by the construction of the Canada Pacific Railway, which had been at that time undertaken by the government. In 1884, the department of marine and fisheries was divided into a department of marine and a department of fisheries, administered by one minister and two deputies,[1] but in 1892 the department was practically restored to its original position with only one deputy.[2] In 1901 the cabinet comprised fourteen ministers, holding the departments given above, and two members without portfolio.[3]

In 1887, parliament constituted a department of trade and commerce, presided over by a minister and having control and supervision of the departments of customs and inland revenue. Provision was made for the appointment of a controller of customs and a controller of inland revenue, each of whom was to be the parliamentary head of those departments under the general instructions of the minister of trade.[4] The object was, as stated in 1887,[5] to follow as far as possible the British system of political under secretaries of state, who would belong to the government, but not to the cabinet.[6] In 1892, the new ministerial organization was carried out and the new controllers went back to their constituencies for re-election as is necessary in the case of ministers accepting an office of emolument under the Crown. These controllers occupied nominally subordinate positions under the department of trade and commerce until late in 1895, when they were made privy councillors and members of the cabinet—a preferment not

[1] 47 Vict., c. 19 (Rev. Stat. of Can., c. 25).

[2] 55-56 Vict., c. 17.

[3] See Can. Almanac for 1901; Statistical Year Book of Canada gives lists of governments since 1867.

[4] 50-51 Vict., c. 10.

[5] 50-51 Vict., c. 11.

[6] Remarks of Sir John Macdonald in introducing the bills. Com. Hans. (1887), vol. 2, pp. 862-863.

justified by the statutes under which these officers held office or by the intention of their framers.[1] When Sir Wilfrid Laurier's government came into office in 1896, the act relating to the controllers was repealed and the old departments of customs and inland revenue restored to their former legal status, with two ministers occupying the same position as other members of the cabinet.[2]

In 1887, provision was also made for a solicitor-general, who is appointed by the governor-general-in-council, to assist the minister of justice in the counsel work of his department. He holds a seat in parliament, provided he is elected when appointed to the office, but he is not a member of the cabinet.[3] A department of labour was organized in 1900 and placed under the supervision of one of the ministers of the regular departments.[4]

**VIII. Constitution of Parliament.**—The constitution of 1867 provides that there shall be "one Parliament for Canada, consisting of the Queen [now a King], an Upper House styled the Senate, and the House of Commons."[5] We have already seen that the sovereign is represented by a governor-general who, in person or by deputy, opens and prorogues parliament.[6] He also assents to all bills in his Majesty's name,[7] and may at

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[1] Com. Hans. (1896), vol. 1., p. 1065 *et seq.*

[2] 60-61 Vict., c. 18. See remarks of Mr. (afterwards Sir) W. Laurier, Com. Hans. (1896), August 24th. Also debates on bill, on June 15th, 1897, Com. Hans., vol. 2, pp. 4122-4130. The salaries of these ministers were restored in 1899 to the same amount paid other ministers ($7,000 each). See 62-63 Vict., cc. 23, 24.

[3] 50-51 Vict., c. 14. The solicitor-general is entitled to be called "honourable" while holding office; the same was true of the controllers until 1895, when they were made privy councillors and consequently entitled to the designation after retiring from office. See Parl. Comp. for 1897, which gives list of members entitled to "honourable," and having a special precedence on state occasions.

[4] 63-64 Vict., c. 24, s. 10.

[5] B. N. A. Act, 1867, s. 17.

[6] *Supra*, 50.

[7] B. N. A. Act, 1867, s.s. 55-57.

any time dissolve parliament,[1] a prerogative of the Crown to be exercised with caution under the advice of the privy council. In the times before the concession of responsible government, when contests between the executive and the assemblies were chronic, the governors dulled the edge of this important instrument by its too frequent use.[2] Under the present system of constitutional government, such a condition of things cannot possibly occur. The responsibility of deciding whether in any particular case a dissolution should be granted, must, under our constitution, "rest absolutely with the representative of the sovereign."[3] In coming to a conclusion, he is guided by considerations of public interests, which will enable him always to judge of the value of the advice given him by his constitutional advisers.[4] Occasions, however, can very rarely arise when he should feel himself bound, for powerful public or constitutional reasons, to refuse the advice of his council; but there can be no doubt that it is the right and duty of the Crown, under any circumstances, to control the exercise of one of the most valued prerogatives of the sovereign. The relations between the representative of the Crown and his advisers are now so thoroughly understood,

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[1] Governor-General's letters-patent, 1878, s. 5; B. N. A. Act, 1867, s. 50.

[2] From 1808 to 1810, the Quebec assembly was dissolved no less than three times by Sir James Craig. See his remarkable speech on one occasion, in which he soundly rated the assembly before dissolving it. Christie, i. 283.

[3] Sir T. E. May, New South Wales Leg. Ass. Votes and Proceedings, 1877-78, vol. i. 451; Todd, Parl. Gov. in B. C., 2nd ed., 818.

[4] "The responsibility, which is a grave one, of deciding whether in any particular case it is right and expedient, having regard to the claims of the respective parties in parliament, and to the general interests of the colony, that a dissolution should be granted, must, under the constitution, rest with the governor. In discharging this responsibility, he will, of course, pay the greatest attention to any representations that may be made to him by those who, at the time, are his constitutional advisers; but if he should feel himself bound to take the responsibility of not following his minister's recommendation, there can, I apprehend, be no doubt that both law and practice empower him to do so." Sir Michael Hicks Beach, sec. of s. for colonies; New Zealand Parl. Papers, 1878; App. A. 2, p. 14; New Zealand *Gazette*, 1878, pp. 911-14.

that a constitutional difficulty can hardly arise which cannot be immediately solved. If the Crown should be compelled at any time to resort to the extreme exercise of its undoubted prerogative right of refusing the advice of its constitutional advisory council of ministers, they must either submit or immediately resign and give place to others who will be prepared to accept the full responsibility of the sovereign's action, which must be based on the broadest ground of the public welfare.[1]

In the constitution of the Senate some security has been given to each of the provinces for the protection of its peculiar local interests, "a protection which it was believed might not be found in a house where the representation was based upon numbers only,"[2] Consequently, the Dominion was divided into three sections, representing distinct interests,—Ontario, Quebec and the maritime provinces of Nova Scotia and New Brunswick—to each of which was given an equal representation of twenty-four members. Provision was also made for keeping the representation for the maritime provinces at the same number, after the entrance of Prince Edward Island.[3] An exception, however, was made in the case of Newfoundland, "which has sectional claims and interests of its own, and will therefore have a separate representation in the Senate."[4] More than that, in order to prevent that body being swamped at any time for political reasons, the constitution expressly limits the number that can sit therein.[5] Special regard has also been had to the peculiar situation of the province of Quebec, where the electoral divisions that existed previous to

[1] See mem. of Lt.-Governor Robitaille, Oct. 30, 1879, in a Quebec constitutional crisis, in which he refused a dissolution to Mr. Joly, who thereupon resigned. Todd's Parl. Gov. in B. C., 2nd ed., 795-8. Also Bourinot's Fed. Gov. in Canada (Johns Hopkins Uni. St., 7th series), 83. Dicey's Law of the Constitution, 3 ed., 356-361.

[2] Sir A. Campbell, Confed. Deb., 21.

[3] B. N. A. Act, 1867, s. 147.

[4] Sir J. A. Macdonald, Confed. Deb., 35.

[5] *Ib.* 36; B. N. A. Act, 1867, ss. 26, 27, 28, 147.

1867 are maintained, and a senator must consequently have his real property qualification, or be resident in the district for which he is appointed—a provision that was not considered necessary for the other provinces.[1] Since 1867 new provinces and the territories of the Northwest have obtained representation in the Senate, which now consists of 81 members when full.

The House of Commons, as first organized under the Act of Union, comprised one hundred and eighty-one members, but the number since the census of 1891 consists of two hundred and thirteen, in accordance with the principle of representation laid down in the federal constitution.[2] In arranging the representation of the House of Commons, the question arose in the Quebec conference as to the best mode of preventing the difficulty in the future of too large a number of members. It was to be expected that in the course of a few decades the population would largely expand, not only in the old provinces which first composed the Dominion, but in the new provinces which would be formed sooner or later out of the vast Northwest. Unless some definite principle was adopted to keep the representation within a certain limit, the House of Commons might eventually become a too cumbrous, unwieldy body. It was decided "to accept the representation of Lower Canada as a fixed standard—as a pivot on which the whole would turn—since that province was the best suited for the purpose, on account of the comparatively permanent character of its population, and from its having neither the largest nor the least number of inhabitants."[3] Hence the danger of an incon-

[1] Hon. G. Brown said in the debate on Confederation (90): "Our Lower Canada friends felt that they had French Canadian interests and British interests to be protected, and they conceived that the existing system of electoral divisions would give protection to those separate interests." The principal object of this provision was to give a representation to the English-speaking population of Lower Canada, in the Eastern Townships especially, which have now two representatives in the Senate.

[2] 55-56 Vict. (1892), c. 2, s. 1. See Bourinot's How Canada is Governed, p. 95.

[3] Sir J. A. Macdonald, Conf. Deb., 38.

venient increase, when the representation is reviewed after each decennial census, has been practically reduced to a minimum.

From 1867 until 1885 members of the house were chosen by the electors qualified to elect representatives to the provincial assemblies, but in 1885 parliament provided a uniform franchise for the Dominion.[1] In 1898 the act was repealed, and the provincial lists again adopted.[2] Manhood suffrage, qualified by residence and British citizenship, exists in all the provinces and territories except in Quebec and Nova Scotia, where the franchise is based on a small property condition, although it is also extended to fishermen, teachers, and other classes.

The question of the duration of parliament also obtained much consideration when the Quebec resolutions were under deliberation; and it was finally decided to follow the example of New Zealand, and give the Canadian parliament a constitutional existence of five years[3] "from the day of the return of the writs for choosing the house," subject, of course, to be sooner dissolved by the governor-general, acting under the advice of the privy council. Eight parliaments have been called together since 1867, and the ninth assembled on the 6th February, 1901. In 1896 the seventh parliament was prorogued on the 23rd April, and dissolved by the governor-general, Lord Aberdeen, on the 24th April, or twenty-four hours before the termination of its legal duration of five years, according to a strict interpretation of section 50 cited above.[4] The longest session since 1867 was held in 1885,

[1] Rev. Stat. of Can., c. 5.

[2] 61 Vic., c. 14.

[3] Sir J. A. Macdonald, Conf. Deb., 39; B. N. A. Act, 1867, s. 50.

[4] Com. J. for 1891 and 1896, where the proclamations dissolving parliament for those years are given at the beginning of the volumes. See Com. Hans., March 16th, 1896, for a debate on a curious controversy that arose as to the actual duration of the seventh parliament, on account of the fact that a writ had been returned for Algoma about 39 days after the 25th April, when the writs were made returnable by the royal proclamation of dissolution. The

when it reached 173 days; the shortest, in the autumn of 1873—the second session that year—when there occurred a ministerial crisis, and parliament closed, after sitting for only sixteen days.[1]

The provisions respecting the election of speaker, quorum, privileges, elections, money votes, royal assent, reserved bills, oaths of allegiance, and use of the French language, will be found in the British North America Act, 1867, given in the appendix to this book. Parliament has full control of all Dominion revenues and duties, which form one consolidated revenue fund, to be appropriated for the public service in the manner, and subject to the charges provided in the Act of Union.[2] The first charge thereon is the cost incident to the collection and management of the fund itself; the second charge is the annual interest on the public debts of the several provinces; the third charge is the salary of the governor-general, fixed at ten thousand pounds sterling. A bill was passed in the first session, reducing this salary to six thousand five hundred pounds, but it was reserved, and subsequently disallowed on the ground "that a reduction in the salary of the governor would place the office, so far as salary is a standard of recognition, in the third class among colonial governments."[3]

**IX. Constitution of the Provincial Governments and Legislatures**—Under the act of 1867, the Dominion government assumed that control over the respective provinces which was previously

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government decided subsequently to construe the constitutional law strictly, and dissolve parliament at the date mentioned above. See *infra*, 66 *n.*, for a somewhat analogous case that occurred in Ontario.

[1] See Appendix M, at end of Bourinot's Parl. Proc., where is given a tabular statement of length of each session, time of opening and prorogation, date of dissolution, and duration of each parliament since confederation. Also "The Statistical Year Book of Canada," which gives similar statistics, including the legislatures of the provinces.

[2] Ss. 102-126. See Rev. Stat. of Can., c. 29, respecting the consolidated revenue fund, collection and management of the revenue and auditing of public accounts.

[3] Dom. Sess. P., 1869, No. 73.

exercised by the imperial government.[1] In each province there is a lieutenant-governor, appointed by the governor-general-in-council, and holding office for five years, but subject to removal at any time by the governor-general for "cause assigned," which must be "communicated to him in writing within one month after the order of his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter, if the parliament is then sitting, and if not, then within one week after the commencement of the next session of parliament."[2] Every lieutenant-governor, on his appointment, takes the same oaths of allegiance and office as are taken by the governor-general.[3] In all the provinces he has the assistance of an

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[1] "The general government assumes toward the local governments precisely the same position that the imperial government holds now with respect to each of the colonies." Sir J. A. Macdonald, Conf. Deb., 1865, p. 42. Also Todd's Parl. Govt. in B. C., 2nd ed., 610.

[2] B. N. A. Act, 1867, ss. 58-59. In the memorable case of Mr. Letellier de St. Just, removed from the lieutenant-governorship of Quebec in 1879, it has been decided that the governor-general acts on the advice of his cabinet in considering the very delicate question of the removal of so important an officer. The colonial secretary, in a despatch of 5th July, 1879, lays it down distinctly. "But it must be remembered that other powers, vested in a similar way by the statute in the governor-general, were clearly intended to be, and are in practice exercised by and with the advice of his ministers, and though the position of a governor-general would entitle his views on such a subject as that now under consideration to peculiar weight, yet her Majesty's government do not find anything in the circumstances which would justify him in departing in this instance from the general rule, and declining to follow the decided and sustained opinion of his ministers, who are responsible for the peace and good government of the whole Dominion to the parliament to which the cause must be communicated." Can. Sess. P., 1880, No. 18, p. 8. For full particulars of this much vexed question see Sen. and Com. Hans., 1878 and 1879; Can. Sess. P., 1878, No. 68; *Ib.*, 1879, No. 19; *Ib.*, 1880, No. 18. Todd's Parl. Govt. in B. C., 2nd ed., 601-622. For communication to parliament in accordance with law, Can. Com. Jour. (1880) 24; Sen. J. (1880), 22-23. In 1900 Mr. McInnes, lieutenant-governor of British Columbia, was removed for cause. See Bourinot's Canada under British Rule, pp. 246-8, where these two cases of removal are briefly reviewed.

[3] Sec. 61, B. N. A. Act, 1867. See form of oaths in Can. Sess. P., 1884, No. 77.

executive council[1] to aid and advise him in administering public affairs, and who, like the privy council of Canada, are responsible to the people through their representatives in the legislature. In case of the absence, illness, or other inability of the lieutenant-governor, the governor-general-in-council may appoint an administrator to execute his office and functions.[2]

In the exercise of his functions, the lieutenant-governor of a province "should, of course, maintain that impartiality towards political parties which is essential to the proper performance of the duties of his office," and for any action he may take he is, under the fifty-ninth section of the act, directly responsible to the governor-general.[3] The only safe principle that he can adopt for his general guidance is that pointed out to him by the experience of the working of parliamentary institutions; to give his confidence to his constitutional advisers while they enjoy the support of the majority of the legislature.

A question has been raised on several occasions since 1867 how far a lieutenant-governor can be considered to represent the Crown. It is now beyond dispute that he is fully authorized to exercise all the powers lawfully belonging to the sovereign in respect of assembling or proroguing, and of dissolving the legislative assemblies in the provinces.[4] A high judicial authority has also authoritatively stated "they represent the Queen as lieutenant-governors did before confederation, in the performance of all executive or administrative acts now left to be performed by lieutenant-governors in the name of the Queen."[5] Later the judicial committee of the

[1] Quebec Stat. 60 Vict. (1897), c. 21; O. Rev. Stat. (1897), c. 14; Rev. Stat. of B. C. (1897), c. 47, ss. 9-18; Rev. Stat. of Man. (1891), c. 54. For Maritime P., see Nova Scotia and New Brunswick, *infra*, p. 67; P. E. Island, s. 13, p. xxii., Stat. of Can. for 1873.

[2] B. N. A. Act, s. 67.

[3] Despatch of the colonial secretary, 1879; Can. Sess. 1880, No. 18, p. 8.

[4] Todd's Parl. Govt. in B. C., 2nd ed., 583, 584.

[5] Ritchie, C. J., Mercer *vs.* Att.-Gen. of Ontario, Can. Sup. Court R., vol. v., 637, 643.

privy council decided that a lieutenant-governor is within his provincial sphere as much a representative of the Crown as the governor-general himself within the larger Dominion limits.[1]

The forty-first resolution of the Quebec conference declared that "the local government and legislature of each province shall be constructed in such manner as the existing legislature of each such province shall provide." Accordingly, in the last session of the old legislature of Canada, an address was passed to the sovereign praying her "to cause a measure to be submitted to the imperial parliament to provide for the local government and legislature of Lower and Upper Canada respectively."[2] In accordance with this address the constitutions of Quebec and Ontario were formally incorporated in the British North America Act of 1867. The legislature of Ontario consists of only the lieutenant-governor and one house, named the legislative assembly, composed in the first instance of eighty-two members, elected for the same electoral districts which returned members to the House of Commons.[3] Since 1867 constituencies have been re-arranged on several occasions, and the representation has been increased to ninety-four members, elected by manhood suffrage qualified by residence.[4]

The legislature of Quebec consists of a lieutenant-governor, a legislative council, and a legislative assembly. The legislative council comprises twenty-four members, appointed for life by the lieutenant-governor in the Queen's name, and representing the same electoral districts from which senators are chosen.[5] The qualifications of the legislative councillors

[1] See *inf. a*, 128.

[2] Leg. Ass. J. (1866), 362.

[3] Leg. Ass. J. (1866), 363, resolution 12. B. N. A. Act, 1867, ss. 69, 70, 1st sch.

[4] See chap. 6, Rev. Stat. of Ont. for 1897, in which the electoral divisions are set forth. Each of the ninety-three districts return one member, with the exception of Ottawa, which has two representatives. *Ib.*, s. 18.

[5] Leg. Ass. J. (1866), 363; B. N. A. Act, 1867, ss. 71, 72 and s. 22, subs. 3. Cons. Stat. of Canada, c. 1, sch. A.

of Quebec are the same as those of the senators from the province.[1] The legislative assembly was originally composed of sixty-five members, elected until 1890 for the same electoral districts represented by the members of the House of Commons for the province.[2] It is provided in the act that while it is always perfectly competent for the legislature of Quebec to alter these districts, it can only change the limits of certain constituencies, especially mentioned, with the concurrence of the majority of the members representing all those electoral divisions.[3] In the session of 1890, the territorial limits of certain counties and electoral districts were modified, and the representation increased and distributed "in a more equitable manner." The total number of representatives in the assembly of Quebec is now seventy-three.[4]

The legislative assembly in each province is summoned by the lieutenant-governor in the king's name. It has a constitutional existence of four years in Ontario,[5] and of five years in

[1] B. N. A. Act, ss. 23 and 73.

[2] Ss. 40 and 80; Doutre, 85. Quebec Rev. Stat. (1888), arts. 60, 64, 90.

[3] These districts are Pontiac, Ottawa, Argenteuil, Huntingdon, Missisquoi, Brome, Shefford, Stanstead, Compton, Wolfe and Richmond, Megantic, town of Sherbrooke. Second sched. B. N. A. Act, 1867. In these districts there is a large English-speaking and Protestant population, and it was considered expedient to insert this proviso securing its rights; but the provision was opposed in the legislature, in 1866, as unnecessary. Turcotte, ii., 590.

[4] See Quebec Stat., 53 Vict., c.c. 2 and 3.

[5] In 1879 it was necessary to provide in Ontario (42 Vict., c. 4, s. 3) that every legislature should continue for four years from the 55th day after the date of the writs for the election and no longer; that in case a meeting of the legislature is necessary before the election for Algoma has taken place, the member elected for that district at the previous election shall represent the same until the new election therefor has been held and the return made in due form; that in such case the duration of the new assembly shall be for four years from the day for which the assembly shall be summoned to meet for the discharge of business and no longer, subject to being sooner dissolved by the lieutenant-governor. This provision was made to meet a constitutional question that had arisen as to the exact duration of the legislature—whether it could not last for four years from the date of the return for Algoma, which was then much later than for the rest of the province. See *Canadian Monthly*, April, 1879, and Parl. Deb. of Ontario, 1879, as to the curious controversy that arose on this constitutional point. In 1885 the foregoing act was amended

Quebec,[1] subject to being dissolved at any time by the same authority that calls them together, a constitutional provision which holds good in the case of all the provincial legislatures. A session must be held once at least in every year, "so that twelve months shall not intervene between the last sitting of the legislature in each province in one session and its first sitting in the next session."[2] The provisions in the act respecting election and duties of speaker, quorum, and mode of voting, in the House of Commons, also apply to the legislative assemblies of the provinces in question.[3] The speaker of the legislative council is appointed by the lieutenant-governor-in-council, and may be a member of the executive council.[4]

The Act of 1867 provides that the constitution of the executive authority as well as of the legislatures of the provinces of Nova Scotia and New Brunswick shall continue as it existed at the time of the union, until altered under the authority of that act.[5] These two colonies had, for very many years, enjoyed the advantages of representative institutions as liberal in all respects as those of the larger provinces in Canada. Under the French régime, and for some time after their conquest by the English, these provinces were comprised in the large, ill-defined territory known as Acadia.[6] From

by dividing Algoma into two electoral districts and provision made to prevent any question arising in the immediate future. Ont. Rev. Stat. of 1887, c. 11, s. 3. This provision was only temporary and was not re-enacted in the Rev. Stat. of 1897, s. 3. In 1901 it was enacted that the existing "legislative assembly, if in session at the expiration of the term fixed by s. 3 of The Act Respecting The Legislative Assembly, shall continue until prorogued by the lieutenant-governor, and for ten days thereafter and no longer." This legislation was intended to prevent an inconvenient interruption of public business by the effluxion of time, such as happened in the case of the Dominion Commons in 1896; see *supra*, 61.

[1] Extended from four to five years, in 1881. Quebec, Rev. Stat. (1888), art. 110.

[2] B. N. A. Act. 1867, s. 86.

[3] *Ib.*, s. 87.

[4] Quebec Stat., 52 Vict., c. 3; *Ib.* 58 Vict., c. 13.

[5] B. N. A. Act, ss. 64, 88. The power of amendment so conferred has not been exercised in Nova Scotia.—Gov. Archibald, Can. Sess. P., 1883, No. 70, p. 11.

[6] Nova Scotia was formally ceded to England by the treaty of Utrecht, 11th

1713 to 1758 the provincial government consisted of a governor or lieutenant-governor and a council supposed to possess both legislative and executive powers. The constitution of Nova Scotia has always been considered "as derived from the terms of the royal commissions to the governors and lieutenant-governors, and from the instructions accompanying the same, moulded from time to time by despatches from secretaries of state, conveying the will of the sovereign, and by acts of the local legislature, assented to by the Crown: the whole to some extent interpreted by uniform usage and custom in the colony."[1] A legislative assembly met for the first time at Halifax[2] on the second of October, 1758, and consisted of twenty-two members.[3]

In 1838 the executive authority was separated from the legislative council, which became a distinct legislative branch only.[4] In 1840 a practical recognition was given for the first time to the principle of responsible government, in the formation of the executive council, but in reality the system was not fully adopted until 1848.[5] In 1867, before the act of union came into force, the legislature of Nova Scotia passed

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April, 1713 (Houston, 3); but Cape Breton still remained a possession of France until the conquest of Canada, and the subsequent treaty of Paris, which gave to Great Britain all the French possessions in British North America, except the islands of St. Pierre, Miquelon and Langley on the coast of Newfoundland, reserved for carrying on the fisheries. The island of Cape Breton was under the government of Nova Scotia from 1766 to 1784, when it was given a separate government, consisting of a lieutenant-governor and council. This constitution remained in force until the re-annexation of the island to Nova Scotia in 1820. Can. Sess. P., 1883, No. 70, p. 10.

[1] Governor Archibald, in an interesting memorandum on the early constitution of Nova Scotia, in answer to an address of parliament. Can. Sess. P., 1883, No. 70, pp. 7-11.

[2] Annapolis (Port Royal under the French régime) was the seat of government until 1749, when Halifax was founded. Murdoch's Hist., ii., c. 11. Bourinot's Builders of Nova Scotia, 12, 122.

[3] Murdoch, ii., 353; Bourinot's Builders, 22-24, and app. G.

[4] Can. Sess. P., 1883, No. 70, pp. 8, 39; Bourinot's Canada under British Rule, p. 174.

[5] Howe's Speeches and Letters, vol. i., 553, 562-4; Todd's Parl. Govt. in B. C., 2nd ed., 73, 80; Eng. Com. P., 1847-8, vol. 42, pp. 51-88.

an act limiting the number of members in the assembly to thirty-eight,[1] and at the same time an address to limit the number of legislative councillors to eighteen failed to pass.[2] The number now varies from twenty-one to eighteen. The assembly has a constitutional existence of five years, since 1897, unless sooner dissolved.

In 1784 the province of New Brunswick, which had received large accessions of loyalists from the United States, was formally created, and a government established, consisting of a council of twelve members, having both executive and legislative functions, and of an assembly of twenty-six members;[3] but in 1832 the executive authority was made quite distinct from the legislative council.[4] In 1848 the principles of responsible government were formally carried out in accordance with the liberal policy adopted by the British government with respect to the British American provinces generally.[5] In the act of union it was provided that the house of assembly of the province, elected in 1866, should, "unless sooner dissolved, continue for the period for which it was elected."[6] The legislature now consists of a lieutenant-governor, and an assembly of forty-six members, elected for

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[1] Rev. Stat. (1900), c. 2, s. 4. For vacating of seats, *Ib.* ss. 5-8. Duration of general assembly, ss. 4, 9. Executive and legislative disabilities, c. 2, ss. 11-17. Previous to 1897, the legislative term was four years.

[2] Jour. Ass. (1867) 28. Efforts have been made in the Nova Scotia assembly to abolish the legislative council, as in Ontario, but so far fruitlessly on account of the opposition in the latter body. An. Reg. (1879) 179-80. See Trans. Roy. Soc. Can., vol. ii., new series, s. 2, for an article by the present author on the constitution of the council.

[3] The first governor was Colonel T. Carleton, brother of Lord Dorchester. See copy of the commission of governor, giving him power to appoint a council, create courts, and call an assembly, etc., in Can. Sess. P. 1883, No. 70, p. 47; Houston, 22.

[4] Lord Glenelg's despatch of 30th April, 1837; see Howe's Speeches and Public Letters, ii., 522.

[5] Todd's Parl. Govt. in B. C., 2nd ed., 80.

[6] Sec. 88.

four years and two months.[1] The legislative council that formerly existed in this province was abolished in 1891.[2]

The island of Prince Edward, formerly known as St. John,[3] formed part of the province of Nova Scotia until 1769, when it was created a separate province with a lieutenant-governor, a combined executive and legislative council, and eventually a legislative assembly of eighteen members.[4] The government of the province was always largely influenced by the proprietors of the lands of the island, distributed by the lords of trade and plantations in the year 1767. Some of the lieutenant-governors were in constant antagonism to the assembly, and during one administration the island was practically without parliamentary government for ten years.[5] Responsible government was not actually carried out until 1850-51, when the assembly obtained complete control, as in the other provinces, of the public revenues.[6] The land monopoly was for many years the question which kept the public mind in a state of constant ferment, and though many attempts were made, with the assistance of the British government, to adjust the conflicting claims of the proprietors and tenants,[7] it was not until the admission of the island into the confederation in 1873 that a practical solution was reached in the agreement of the Dominion government to advance the funds necessary

[1] N. B. Stat. (1889), c. 3., s. 98, am. by *Ib.* (1896), c. v.

[2] *Ib.* 54 Vict., c. ix.

[3] It was finally ceded to Great Britain by the treaty of Paris, 1763. The name was changed in 1799, in honour of Edward, Duke of Kent. J. Stewart's account of P. E. Island, 247.

[4] Captain Walter Paterson, one of the original land owners of the colony, was the first lieutenant-governor. See copy of his commission, Can. Sess. P. 1883, No. 70, p. 2; Houston, 21. The assembly first met in 1773. Stewart's P. E. Island, 177.

[5] Campbell, 82. Mr. C. Douglas Smith was lieutenant-governor, and did not summon the legislature from 1814-1817. He dissolved three successive legislatures which proved intractable, and he was removed in 1824.

[6] Col. Office List, 1900, p. 55. Bourinot's Canada under British Rule, p. 180.

[7] Campbell, 162.

to purchase the claims of the proprietors.[1] It was provided, in the act of 1873 admitting the island, that the constitution of the executive authority and of the legislature should continue as at the time of the union, unless altered in accordance with the act of 1867, and that the assembly existing in 1873 should continue for the period for which it was elected.[2] The legislative council, elected for many years on a property qualification, was abolished in 1893 as a separate house, and united with the assembly. The fifteen constituencies of the island now return each a councillor elected on a real estate qualification, to the value of $325, and a member elected on the general franchise, practically manhood suffrage.[3] The legislature consequently now consists of a lieutenant-governor and an assembly of thirty members, elected for four years.

The local constitution arranged for the province of Manitoba by the Canadian parliament in 1870 provided for a lieutenant-governor, an executive council of not less than five persons in the first instance, a legislative council of seven members to be increased to twelve after four years, and a legislative assembly of twenty-four members elected to represent electoral districts set apart by the lieutenant-governor.[4] In 1876, Manitoba abolished the legislative council, and the legislature consequently now consists only of the lieutenant-governor and assembly.[5] The same provisions as in the other provinces exist with respect to the duration of the legislature and its meetings once a year. By act of the legislature in 1890, the English language alone is to be used in the records and journals of the assembly, and in the process and pleadings

[1] Com. Jour. (1873) 401; Dom. Stat. of 1873, p. xi. A compulsory land purchase act passed the provincial legislature in 1875. Todd's Parl. Gov. in B. C., 2nd ed., 479. Eng. Com. P., 1875, vol. liii, 764, 766-768.

[2] Can. Stat. 1873, p. xii.

[3] See Bourinot's "How Canada is Governed," pp. 155, 161; P. E. I. Stat. for 1893, c. 1.

[4] 33 Vict., c. 3. See Sess. P. 1871, No. 20, for measures taken to organize the provincial government.

[5] Man. Stat., 39 Vict., c. 28 (Rev. Stat. of Man., 1891, c. 84, s. 3). Parl. Companion, 1878, p. 310; Sess. Pap. 1876, No. 36.

of the courts.[1] The present assembly now consists of forty members elected by manhood suffrage.[2]

Like Rupert's Land and the Northwest Territories, Vancouver Island and the mainland, first known as New Caledonia, were for many years under the control of the Hudson's Bay Company. Vancouver Island was nominally made a Crown colony in 1849; that is, a colony without representative institutions, in which the government is carried on by a governor and council, appointed by the Crown.[3] In 1856 an assembly was called, despite the insignificant population of the island. In 1858 New Caledonia was organized as a Crown colony under the name of British Columbia, as a consequence of the gold discoveries which brought in many people.[4] In 1866, the colony was united with Vancouver Island under the general designation of British Columbia.[5] When the province entered the confederation of Canada in 1871, it was governed by a lieutenant-governor appointed by the Crown, a legislature composed of heads of the public departments and several elected members; but it was expressly declared in the terms of union that "the government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of British Columbia."[6] Since its admission, British Columbia has a local constitution similar to that of the majority of the other provinces: a lieutenant-governor, an executive council, responsible to the legislature,

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[1] See Rev. Stat. of Man. for 1891, p. lv., where the words "as far as the legislature has power to enact" are added in italics by the revisers of the statutes.

[2] Rev. Stat. of M. (1891), c. 50, am. by 55 Vict. c. 13, constituting forty electoral divisions.

[3] The company's officer, Sir James Douglas, was appointed governor. See Colonial Office List, 1900, p. 53. Bourinot's Canada under British Rule, pp. 231, 232.

[4] See Imp. Stat. 21-22 Vict., c. 99; Rev. Stat. of B. C. (1897), p. lxi.

[5] Imp. Stat. 29-30 Vict., c. 67; Rev. Stat. of B. C. (1897), p. lxvii.

[6] Can. Sess. P., 1867-8, No. 59; Stat. for 1872, p. lxxxix.; Rev. Stat. of B. C. (1897), p. ciii.

and one house only, a legislative assembly of thirty-eight members, elected for four years, on manhood suffrage.[1]

**X. Organization of the Northwest Territories.**—After the acquisition of the Northwest, the parliament of Canada provided a simple machinery for the government of that vast territory, preparatory to the formation of new provinces therein. The first act passed in 1869 was only of a temporary character, and as previously shown, it never practically came into operation; but in the act of the following year, forming the new province of Manitoba, provision was also made for the government of that portion of Rupert's Land and the Northwest Territory not included within the limits of that province.[2]

For some years the territories were governed by a simple machinery adapted to their small population: a lieutenant-governor appointed by the governor-general-in-council, and acting under its instructions, a small council composed of the judges of the supreme court of the territories and other persons appointed by the governor-general-in-council. The lieutenant-governor-in-council could make ordinances for the government of the Northwest within certain limitations. The right to elect a proportion of the council was the first concession made in the direction of a more popular form of government. In 1888 a legislative assembly of twenty-two members was created with the powers and duties of the old council. This assembly had for some time the assistance of the three judges of the supreme court of the territories as legal experts, who could take part in the debates, but not vote. The lieutenant-governor had also the aid of an advisory council on matters of finance, who held office during pleasure. From 1888 until 1900, other changes were made in the government of the Northwest. At the present time it is composed of a lieutenant-governor, who holds office during pleasure, but practically for five years, as in the provinces; of an executive council chosen by the lieutenant-governor from

[1] See Rev. Stat. of B.C. (1897), c. 47. "An act respecting the constitution of the province," am. by s. 2, c. 38, statutes of 1898.

[2] *Supra*, 44.

members of the assembly, and holding office on the same tenure as in the provinces; of an assembly of thirty-one members elected by British subjects who are actual male residents of adult age for twelve months before an election. This assembly has a duration of four years, unless sooner dissolved by the lieutenant-governor, and has power to make ordinances with reference to all matters of a private or local nature in the territories, with some limitations practically the same legislative power possessed by the provinces. Justice is administered by a chief justice and four puisné judges. Legal experts are no longer appointed.[1]

In accordance with a resolution passed by the Canadian House of Commons in 1882, an order-in-council marked out in the Northwest the following provisional divisions for administrative and legislative purposes: Alberta, Athabasca, Assiniboia and Saskatchewan.[2] By proclamation of the 2nd of October, 1895, the following additional districts were established in the unorganized and unsettled territories: Ungava, Franklin, Mackenzie and Yukon.[3]

The discovery of gold in the provisional Yukon district and the consequent migration of a large population into the country subsequently required special legislation in the Dominion parliament. The district is now governed by a commissioner, appointed by the governor-general-in-council,

[1] For legislation respecting territories until 1900, see Dom. Rev. Stat. 1886, c. 50; 51 Vict. (1888), c. 19; 54-55 Vict. (1891), c. 22; 57-58 Vict. (1894), c. 17; 60-61 Vict. (1897), c. 28; 61 Vict. (1898), c. 5; 63-64 Vict. (1900), c. 44. In explaining the act of 1897, Mr. Sifton, minister of the interior, said: "The bill will give the people of the territories a government which shall not have the full powers of a provincial government, but in so far as they have power to deal with any subjects they shall do it in the same way as the other provinces. They will have ministers who are responsible to the legislature, and the rules and precedents which apply to the provincial governments will apply to the governments of the territories." Can. Com. Hans. (1897), vol. 2, p. 4115.

[2] Can. Com. J. (1882), 509; *Canada Gazette*, Dec., 1882. Regina, in Assiniboia, is the capital.

[3] See for boundaries of all the provisional districts in the Northwest, Col. Off. List for 1900, pp. 56 and 57.

and acting under instructions from Ottawa; a council, partly elected by the people, and partly appointed by the Crown, with power to make ordinances for the good government of the territory within the limitations set forth by the law; a superior court of record comprised of one or more judges, from whose judgments an appeal can be made to the supreme court of British Columbia and to the supreme court of Canada.[1] The boundary line between the Yukon district and the territory of Alaska is a matter of controversy between the governments of Great Britain and the United States, and a provisional boundary has been arranged by authorized geographical experts until such time as the questions at issue can be finally adjusted.[2]

The acquisition of the Northwest brought a large number of Indian tribes under the jurisdiction of the Canadian government, who have faithfully carried out the policy first laid down in the proclamation of 1763.[3] Between 1871 and 1877 seven treaties were made by the Canadian government with the Crees, Chippewas, Salteaux, Ojibways, Blackfeet, Bloods and Piegans, who received certain reserves of land, annual payments of money and other benefits, as compensation for making over to Canada their title to the vast country where they had been so long the masters.[4] From that day to this the Indians have become the wards of the government, who have always treated them with justice and discretion.

Pending the settlement of the western boundary of Ontario, it was considered expedient in 1876 to create a separate territory out of the eastern part of the Northwest.[5] This territory

[1] For proclamation of Aug. 16, 1897, see *Canada Gazette*, vol. 31, p. 350. For legislation respecting Yukon, see Canada Stat., 61 Vict., c. 6; 62-63 Vict., c. 11.

[2] Consult Bourinot's Canada under British Rule, pp. 310-313, also remarks of Sir W. Laurier, prime minister, Feb. 11th, 1901.

[3] See *supra*, 8.

[4] See Lt.-Gov. Morris's Treaties of Canada with the Indians of Manitoba and N. W. T., 1880.

[5] 39 Vict., c. 21; Rev. Stat. of Can., c. 53; *infra*, 77, for settlement of boundary question.

is known as the district of Keewatin, and is under the jurisdiction of the lieutenant-governor of Manitoba, *ex-officio*, who may have the assistance, if necessary, of a council, of not less than five persons and not more than ten, to aid him in the administration of affairs, with such powers as may be conferred upon them by order of the governor-in-council.[1] This arrangement of a separate district is altogether of a provisional nature, and will come entirely to an end with the rapid development of the Northwest Territories.[2] The district of Keewatin has been materially altered by the extension of the limits of Manitoba, in accordance with acts passed since 1876,[3] and by the extension of the boundary of Ontario through the decision of the judicial committee of the privy council in 1884.[4]

In 1871 it was found expedient to obtain certain legislation from the imperial parliament in order to remove doubts that were raised in the session of 1869, as to the power of the Canadian legislature to pass the Manitoba Act, especially the provisions giving representation to the province in the Senate and House of Commons. It appears that the address passed in the first session of the parliament of Canada contained no provisions with respect to the future government of the country, whilst the general purview of the British North America Act, 1867, as respects representation in the Senate and House of Commons, seems to be confined to the three provinces of Canada, Nova Scotia and New Brunswick, originally forming the Dominion. Whilst the admission of Newfoundland and Prince Edward Island is provided for, no

[1] No such orders now appear in the statutes of Canada.

[2] Can. Hans. (1876), 86, remarks of Mr. Mackenzie, then premier, in introducing bill.

[3] 40 Vict., c. 6, defined new boundaries of the provinces of Manitoba and Keewatin. By 44 Vict., c. 14, the boundaries of the province of Manitoba were extended. See Rev. Stat. of Can., c. 53. For debates as to boundary question, see Sen. Hans. (1880-81), 606 *et seq.*, Com. Hans. (1880-1), 2 vol., p. 1443 *et seq.* The northwestern, northern and northeastern limits of the province of Quebec are determined by c. 6 of Quebec Stat. of 1898, and c. 3 of Dom. Stat. of 1898.

[4] See *infra*, 77.

reference is made to the future representation of Rupert's Land and the Northwest Territory, or of British Columbia. Under these circumstances an act was passed through the imperial parliament substantially in accordance with a report submitted by the Canadian minister of justice to the privy council, and transmitted to the secretary of state for the colonies by the governor-general. This act gives the parliament of Canada power to establish new provinces in any territories of the Dominion of Canada, not already included in any province, and to provide for the constitution and administration of such provinces. Authority is also given to the Canadian parliament to alter the limits of such provinces with the consent of their legislatures. The previous legislation of 1869 and 1870 respecting the province of Manitoba and the Northwest, was sanctioned formally in the act.[1]

In 1886, the imperial parliament, on addresses of the Canadian parliament, also passed an act empowering the latter body to provide for the representation in the Senate and House of Commons, of any territories which may form part of the Dominion, but are not included in any regularly organized province. This measure was necessary to remove doubts as to the validity of the Canadian act of 1886, giving representation to the territories in the Canadian parliament.[2]

**XI. Boundary Question.**—For a number of years there was a complicated dispute between the governments of Ontario and Canada as to the boundary of the province on the north and west. This question has given rise to a vast amount of legal and political literature since the acquisition of the Northwest Territories, and it is necessary here to state briefly its nature. In 1878 three arbitrators were chosen on behalf of the Dominion and Ontario governments to come to a settlement

[1] Imp. Stat. 34 and 35 Vict., c. 28; see App. B. For history of this question, Sess. P. 1871, No. 20; Com. Jour. (1871), 136, 145, 291. The Imp. Act 31 and 32 Vict., c. 92, enabled the legislature of New Zealand to withdraw a part of a territory from a province and form it into a county.

[2] Imp. Stat. 49-50 Vict., c. 35, App. D.; Can. Stat., 49 Vict., c. 24. The N. W. T. have now two members in Senate, and four in Commons.

of the question.[1] They arrived subsequently at a unanimous decision, but while the Ontario legislature accepted the award as satisfactory and passed an act giving effect to the same, so far as laid in the power of the province,[2] the Dominion government took no steps whatever in the matter. The subject remained in abeyance until 1884, when a case was arranged for reference to the judicial committee of the privy council, but before the case was argued, the Dominion government withdrew, so that it went before their lordships only as affects the boundary between Ontario and Manitoba. At an early stage of the proceedings, their lordships decided that the award was not binding, inasmuch as no legislation had taken place to give effect to the same, but they found at the same time that "so much of the boundary lines laid down by that award as relates to the territory now in dispute between Ontario and Manitoba to be substantially correct." Their lordships did not express an opinion "as to the sufficiency or otherwise of concurrent legislation of the provinces of Ontario and Manitoba, and of the Dominion of Canada," but at the same time think it "desirable and most expedient that an imperial act of parliament should be passed to make this decision binding and effectual."[3] The result of this decision was a final settlement of this vexed public question. The Ontario government has taken all the measures necessary to establish its jurisdiction in the territory given to it by the decision in question. As shown in another page, the question that was subsequently raised with respect to the title to the Indian lands in the disputed territory was decided by the courts in favour of Ontario.[4] In 1889 the imperial parliament passed

[1] Ann. Reg. 1878, pp. 189-194. The arbitrator for Ontario was Chief Justice Harrison; for the Dominion, Sir Francis Hincks; Sir Edward Thornton, British Minister at Washington, was the third, chosen by the two conjointly. See Ont. Sess. P., 1872-1887, for copious reports on this complicated question; especially the one by Hon. D. Mills, M.P., which contains instructive maps compiled from authoritative sources.

[2] See Ont. Stat. 42 Vict., c. 2. (Rev. Stat. of 1887, c. 4.)

[3] L. N. 1884, pp. 281-282. See remarks of Mr. Blake, Can. Hans., 1885, pp. 17, 18; and of Sir J. A. Macdonald, *Ib.*, 23. Also April 13, 1888.

[4] See *infra*, 122.

an act, in accordance with an address from the Canadian parliament, declaring the westerly, northerly, and easterly boundaries of Ontario and carrying out the decision of the privy council.[1]

**XII. Constitutional Provisions Respecting Provinces.** — It is provided in the British North America Act that the local legislature may amend the constitution of a province, except as regards the office of lieutenant-governor,[2] and some provinces have availed themselves of the power thus conferred by abolishing the legislative council, and extending the duration of the legislature.[3] The provisions relating to the speaker, quorum, mode of voting, appropriation and tax bills, money votes, assent to bills, disallowance of acts and signification of pleasure on reserved bills—that is to say, the provisions affecting the parliament of Canada extend to the legislatures of the several provinces. Accordingly, any bill passed by a legislature of a province may now be disallowed by the Dominion government within one year after its receipt. The lieutenant-governor may also reserve any bill for the "signification of the pleasure of his excellency the governor-general," and it cannot go into operation unless official intimation is received within one year of its having been approved.[4]

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[1] Imp. Stat. 52-53 Vict., c. 28 (at beginning of Can. Stat. 1890), and Ont. Rev. Stat. for 1897; Can. Com. J. (1889), 385; Can. Hans. (1889), 1654-1658. See Ont. Rev. Stat. (1887), c. 4.

[2] Sec. 92, sub-sec. 1, and as respects provinces coming in after 1867, see Can. Stat. 1870, c. 3, ss. 2, 10; 1872, p. lxxxviii., ss. 10 and 14; 1873, pp. xii., xiii, etc.

[3] See *supra* (British Columbia) 72; (Manitoba) 71; New Brunswick, 70; Prince Edward Island, 71; also 66, 67, as to duration of Quebec legislature extended to five years, and as to changes in the representation in the legislative assembly of the province; 67 *n.* as to Ontario; 69 as to Nova Scotia.

[4] Ss. 87, 90. Also Manitoba Act, 33 Vict., c. 3, ss. 2, 21; British Columbia, 1872, p. lxxxviii., s. 10; P. E. Island, p. xxii.

# CHAPTER II.

## A REVIEW OF QUESTIONS OF

## *LEGISLATIVE JURISDICTION.*

I. Distribution of Legislative Powers, p. 80.—II. Decisions of the Privy Council of England, and of the Courts of Canada, on Questions of Legislative Jurisdiction: Controverted Elections, p. 85; Fire Insurance, p. 87; Temporalities Fund of the Presbyterian Church, p. 90; Sale, Manufacture, Prohibition and Regulation of Intoxicating Liquors, p. 92; Competency of a Provincial Legislature to License Brewers to Sell Liquors by the Wholesale, p. 92; Canada Temperance Act, p. 94; Liquor Traffic in the Provinces, p. 97; Prohibition of Sale of Liquors, p. 103; Fisheries, Harbours, and Navigable Waters, p. 109; Escheats, p. 115; Precious Metals Case, p. 118; Questions respecting Indian Lands, p. 119; Indian Claims Case, p. 122; Taxes on Incorporated Companies, p. 124; Education, p. 125; Powers and Privileges of the Governments and Legislatures of the Provinces, p. 127; Privileges of Provincial Legislatures, p. 130.—III. Rules of Construction and Constitutional Privileges laid down by Courts, p. 133.—IV. Disallowance of Provincial Acts, p. 142.—V. Position of the Judiciary, p. 149.

**I. Distribution of Legislative Powers.**—In the distribution of the legislative powers entrusted to the general parliament and the local legislatures respectively, the constitution makes such an enumeration as seems well adapted on the whole to secure the unity and stability of the Dominion and at the same time gives every necessary freedom to the several provinces in the management of their local and municipal affairs. In arranging this part of the constitution, its framers had before them the experience of eighty years' working of the federal system of the United States, and were able to judge in what essential and fundamental respects that system appeared to be defective.[1] The doctrine of state sovereignty had been pressed to extreme lengths in the United States, and had formed one of the most powerful arguments of the advocates of secession. This doctrine had its origin in the fact that all powers, not

[1] Sir J. A. Macdonald, Conf. Deb., 1865, p. 32.

expressly conferred upon the general government, are reserved by the constitution to the states.[1] Now, the federal constitution of Canada follows the very reverse principle, with the avowed object of strengthening the basis of the confederation, and preventing conflict as far as practicable between the provinces that compose the union.[2] This constitution emanates from the sovereign authority of the imperial parliament, which has acted in accordance with the wishes of the people of the several provinces, as expressed through the constitutional medium of their respective legislatures. This imperial charter, the emanation of the combined wisdom of the imperial parliament and the subordinate legislatures of the several provinces affected, confers upon the general government the exclusive legislative authority over all matters respecting the public debt, regulation of trade and commerce, postal service, navigation and shipping, Indians, census and statistics, and all other matters of Dominion import and significance.[3] On the other hand the local legislatures may exclusively make laws in relation to municipal institutions, management and sale of public lands belonging to the provinces, incorporation of companies with provincial objects, property and civil rights in the province, and "generally all matters of a merely local or private nature in the province."[4] The provincial legislatures have also exclusive powers of legislation in educational matters, subject only to the right of the

[1] The 10th art. of the constitution of the U. S. reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This art. did not appear in the first constitution of 1787, but was agreed to with other amendments by the first congress in 1789, and subsequently ratified by the states. See Smith's Cons. Manual and Digest, published by order of Congress, 1877. Also, Story on the Constitution (Cooley's 4th ed.), ss. 1906-1909; Bourinot's Can. Studies in Comp. Politics, 44-48.

[2] Sir J. A. Macdonald, Conf. Deb., 1865, p. 33: "We have thus avoided that great source of weakness which has been the cause of the disruption of the United States. We have avoided all conflict of jurisdiction and authority," etc.

[3] B. N. A. Act, 1867, s. 91. See appendix to this book.

[4] B. N. A. Act, s. 92.

Dominion parliament to make remedial laws under certain circumstances.[1] The object of this provision is to secure, as far as practicable, by statute, to a religious minority of a province, the same rights, privileges and protection which it may have enjoyed at the time of the union.[2] The local legislatures may, however, legislate as to separate schools, provided that the legislation be not such as prejudicially affects the rights or privileges theretofore possessed by such schools, and they may pass laws interfering with unimportant matters such as the election of trustees, or the every-day detail of the working of such schools, as settled by statute prior to confederation.[3] The general parliament and local legislatures have also concurrent powers of legislation respecting agriculture and immigration, provided the provincial law is not repugnant to any act of the parliament of Canada.[4] The powers of the provincial governments are distinctly specified in the act of union, whereas those of the general government cover the whole ground of legislation not so expressly reserved to the provincial authorities.[5] The Dominion government is authorized in express terms "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this act

[1] B. N. A. Act, s. 93.

[2] See New Brunswick school law controversy, Todd, Parl. Gov. in B. C., 2nd ed., 458; Can. Sess. P., 1877, No. 89. A reference to the correspondence on this vexed question clearly shows that both the Imperial and Dominion authorities concurred in the view that it is not proper for the federal authority to attempt to interfere with the details or accessories of a measure of the local legislature, the principles and objects of which are entirely within its competency. See Manitoba school question, *infra*, p. 125 *et seq.*

[3] Board of School Trustees *v.* Grainger *et al.*, 25 Grant's Chan. R., 570.

[4] B. N. A. Act, s. 95.

[5] "The government of the United States is one of enumerated powers, and the governments of the states possess all the general powers of legislation. Here (in Canada) we have the exact opposite. The powers of the provincial governments are enumerated, and the Dominion government possesses the general powers of legislation." Ritchie, C. J., Can. Sup. C. R., iii. 536.

assigned exclusively to the legislatures of the provinces";[1] and in addition to this specific provision it is enacted that "any matter coming within any of the classes of subjects enumerated in this section [that is, the 91st, respecting the powers of general parliament] shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the legislatures of the provinces."

It must necessarily happen that, from time to time, in the operation of a written constitution like that of Canada, doubts will arise as to the jurisdiction of the general government and local legislatures over such matters as are not very clearly defined in the sections enumerating the powers of the respective legislative authorities. No grave difficulty should arise in arriving sooner or later, as a rule, at a satisfactory solution by means of the decisions of the judicial committee of the privy council, and of the higher courts of the Dominion. An act establishing a supreme court for Canada was passed in the session of 1875, in accordance with the 101st section of the British North America Act, 1867, which provides "for the constitution, maintenance and organization of a general court of appeal for Canada."[2] This court has an appellate jurisdiction in the case of controverted elections,[3] and may examine and report on any private bill or petition for the same.[4] It has also jurisdiction in cases of controversies between the Dominion and the provinces themselves, on condition that the legislature of a province shall pass an act agreeing to such legislation.[5] In 1891, in order to meet cases of constitutional

[1] See *infra*, 94; judgment of privy council *re* "Canada Temperance Act," showing the large powers given to the Dominion government by this provision of the B. N. A. Act, 1867.

[2] 38 Vict., c. 11. The provincial courts have equal power to declare any Canadian statute unconstitutional; the supreme court is a court of appeal for all the provinces and territories of the Dominion.

[3] *Infra*, 85.

[4] Sen. J. (1876), 155, 206, 207; *Ib.* (1882), 143, 158-9, 273, 301-2.

[5] Can. Rev. Stat. (1886), c. 135, ss. 72-74. The provincial legislatures have passed acts to facilitate such references to the supreme court.

difficulty that were frequently arising in the operation of the British North America Act, 1867, parliament enlarged the scope of the jurisdiction of the supreme court by allowing a reference to that body by the governor-in-council, of important questions of law or fact touching provincial legislation or the constitutionality of any legislation of the parliament of Canada. The court can give reasons for its opinions on any question referred to them, as in the case of a judgment upon an appeal in the ordinary way. The opinion of the court, although advisory only, shall, for all purposes of appeal to his Majesty's council, be treated as a final judgment of the court between parties.[1] The supreme court of Canada, however, can be considered a general court of appeal for the Dominion in only a limited sense, for in addition to the power of appealing from the supreme court itself to the privy council of England, there exists in every province the right of an appeal direct from its appellate tribunals to the same imperial tribunal. It is the continued practice of the judicial committee of the privy council "to entertain appeals from the supreme court where it is considered that any error of law has been made, and substantial interests have been involved."[2]

**II. Decisions of the Privy Council of England and of the Courts of Canada on Questions of Legislative Jurisdiction.**—Many important cases of doubt as to the construction to be placed on the 91st and 92nd sections of the British North America Act, 1867, have already been referred to the privy council and to the

[1] 54-55 Vict., c. 25. This provision is in accordance with suggestions made by Mr. Edward Blake and other eminent constitutional authorities, who for years recognized the necessity for a reasoned opinion of the supreme court on important questions of law or fact. See Com. Hans., 1890, vol. 2, pp. 4083-4094, for remarks of Sir John Macdonald and Mr. Blake; also remarks of Sir John Thompson, March 6, 1893, pp. 1790-1819, Com. Hans.

[2] See Cassells, 4, 75, 76; L. N. (1889), 281, 283. Can. Rev. Stat. (1886), c. 135. The judgment of the supreme court is now final in criminal matters. See 51 Vict., 43, repealing 50-51 Vict., c. 50, s. 1, sub-s. 5. By 50-51 Vict., c. 16, all original exchequer court jurisdiction was taken away from the supreme court judges, and an exchequer court, composed of one judge, specially constituted.

supreme court of the Dominion. Already in Canada, as in the United States, a large amount of constitutional learning and research is being brought every year to the consideration of the perplexing questions that must unavoidably arise in the interpretation of a written constitution.[1] In the following pages I cite some of the more important decisions given by the high tribunals just mentioned, with the view of showing the conclusions they have formed with respect to certain legislative powers of the Dominion parliament and provincial legislatures.

*Controverted Elections.*

In 1874, the Dominion parliament passed an act imposing on the judges of the superior courts of the provinces the duty of trying controverted elections of members of the House of Commons.[2] The question was raised in the courts, whether the act contravenes that particular provision of the 92nd section of the B. N. A. Act which exclusively assigns to the provincial legislatures the power of legislating for the administration of justice in the provinces, including the constitution, maintenance and organization of provincial courts of civil and criminal jurisdiction, and including procedure in civil (not in criminal) matters in those courts. The question came at last before the supreme court of Canada, which unanimously held:

That whether the act established a Dominion court or not, the Dominion parliament had a perfect right to give to the superior courts of the respective provinces, and the judges thereof, the power, and impose upon them the duty, of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established courts to discharge the duties assigned to them by that act, in any particular invade the rights of the local legis-

[1] See Cartwright's cases under the B. N. A. Act of 1867, 5 vols., already issued from 1882 to 1896.

[2] "The Dominion Controverted Elections Act, 1874"; 37 Vict., c. 10. (Rev. Stat. of 1886, c. 9).

latures. That the Dominion parliament has the right to interfere with civil rights, when necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of Canada. That the exclusive power of legislation given to provincial legislatures by sub-s. 14 of s. 92, B. N. A. Act, over procedure in civil matters, means procedure in civil matters within the powers of the provincial legislatures.[1]

Application was made to the privy council for leave to appeal from the foregoing judgment of the supreme court. Their lordships, in refusing such leave, expressed these opinions: That there is no doubt about the power of the Dominion parliament to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces. That the result of the whole argument offered to their lordships had been to leave them under the impression that there was here no substantial question requiring to be determined, and that it would be much more likely to unsettle the minds of her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of the petition and so throw a doubt on the validity of the decision of the court of appeal below, than if they were to advise her Majesty to refuse it.[2]

In a later case it was decided that no appeal from the decision of the supreme court of Canada in a controverted election case will be entertained by the privy council of England. In giving their judgment their lordships stated that there are strong reasons why such matters should be decided

[1] Can. Sup. C. R., iii. 1 (Valin *v.* Langlois). This case came before the court on appeal from the judgment of Chief Justice Meredith, of the superior court of Quebec, declaring the act to be within the competency of the Dominion parliament, 5 Q. L. R., No. 1. The Ontario court of common pleas in 1878 unanimously agreed that the act was binding on them. Ont. Com. P. R., vol. xxix., 261. But certain judges of Quebec held adverse opinions. Quebec L. R., vol. v., p. 191.

[2] 5 App. Cas. 115; Cart., i. 158.

within a colony, especially it is "most important that no long time should elapse before the constitution of the body is known; and yet if the Crown is to entertain appeals in such cases, the necessary delays attending such appeals would greatly extend the time of uncertainty—which the legislature has striven to limit."[1]

*Fire Insurance.*

In 1876, the legislature of Ontario passed an act[2] intituled "An act to secure uniform conditions in policies of fire insurance." This statute was impeached on the ground mainly that the legislature of Ontario had no power to deal with the general law of insurance; that the power to pass such enactments was within the legislative authority of the Dominion parliament, under s. 91, sub-s. 2, B. N. A. Act, "regulation of trade and commerce." The question having come before the supreme court of Canada, it held that the act in question was within the competency of the Ontario legislature, and is applicable to insurance companies, whether foreign or incorporated by the Dominion.[3]

The question came finally before the privy council on appeal from the supreme court of Canada, and their lordships decided: That construing the words "regulation of trade and commerce" by the various aids to their interpretation, they would include political arrangements in regard to trade and requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their lordships, however, abstained from any attempt to define

[1] Glengarry Case, Kennedy *v.* Purcell, 7th July, 1888. See Cassells's Practice, 86; Can. Sup. C. R., xiv. 453-515.

[2] 39 Vict., c. 24; Ont. Rev. Stat., c. 167.

[3] Can. Sup. C. R., iv. 215. The Citizens and the Queen Ins. Cos. *v.* Parsons, Western Insurance Co. *v.* Johnston. This judgment of the supreme court affirmed the judgments of the court of appeal for Ontario (4 App. Rep., Ont., 96, 103), which had affirmed the judgments of the queen's bench; 43 U. C., Q.B., 261, 271.

the limits of the authority of the Dominion parliament in this direction. It is sufficient for the decision of the case under review to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single province, and therefore that its legislative authority did not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by sub-section 13 of section 92. That the act in question, so far as relates to insurance or property within the province, may bind all fire insurance companies, whether incorporated by imperial, dominion, provincial, colonial or foreign authority. That the act of the Dominion parliament,[1] requiring insurance companies to obtain licenses from the minister of finance as a condition to their carrying on business in the Dominion, is a general law applicable to foreign and domestic corporations, and in no way interferes with the authority of the Ontario legislature to legislate in relation to the contracts which corporations may enter into in that province.[2]

Since the first session of the Dominion parliament many statutes have been passed relating to insurance and insurance companies. The local legislatures have also granted acts of incorporation to companies that do business within the limits of a province. It is now authoritatively decided that the terms of paragraph eleven of section 92 (giving powers to provincial legislatures for provincial objects), are considered sufficiently comprehensive to include insurance companies, whose object is to transact business within provincial limits. If a company desire to carry on operations outside of the province, it will come under the provisions of the general federal law, to which it must conform, and which contains special provisions for

[1] 38 Vict., c. 20.

[2] 45 L. T. N. S. 721 ; Cart., i. 265. The Citizens and Queen Insurance Cos. v. Parsons.

such purposes.[1] The Dominion parliament may give power to contract for insurance against loss or damage by fire, but the form of the contract, and the rights of the parties thereunder, must depend upon the laws of the country or province in which the business is done.[2] Policies of insurance being mere contracts of indemnity against loss by fire, are, like any other personal contracts against parties, governed by local or provincial laws. The provincial legislature has the power to regulate the legal incidents of contracts to be enforced within its courts, and to prescribe the terms upon which corporations, either foreign or domestic, shall be permitted to transact business within the limits of the province—the power being given to local legislatures by the constitution to legislate upon civil rights and property.[3]

The privy council, in their judgment, confirming that of the Canadian courts, made special reference to the fact that Dominion legislation has distinctly recognized the right of the provincial legislatures to incorporate insurance companies for carrying on business within the province itself.[4]

In this connection it is necessary to refer to the fact that certain legislation in the province of Quebec affecting insurance companies has been declared beyond the competency of the local legislature. The act in question (39 Vict., chap. 7) imposed a tax upon the policies of such insurance companies as were doing business within the province. The statute enacts: That every assurer carrying on any business of assurance, other than that of marine assurance exclusively, shall be bound to take out a license in each year, and that the price of such license shall consist in the payment to the Crown for the use of the province at the time of the issue of any policy or making or delivery of each premium, receipt, or renewal, of certain percentages on the amount received as premium on

[1] Fournier, J., Can. Sup. C. R., iv. 277, 278.

[2] Harrison, C.J., 43 U. C. Q.B. 261; Doutre, 267.

[3] 4 Ont. App. 109.

[4] See 40 Vict., c. 42, s. 28; Rev. Stat. of Can., c. 124, s. 3.

renewal of assurance, such payments to be made by means of adhesive stamps to be affixed on the policy of assurance, receipts, or renewals. For each contravention of the act a penalty of fifty dollars is imposed.

The question of the constitutionality of the act came before the judicial committee of the privy council, who decided: That the act was not authorized by sub-sections two and nine of section ninety-two of the B. N. A. Act with respect to direct taxation and licenses for raising a revenue for provincial, local or municipal purposes. That a license act by which a licensee is compelled neither to take out nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a stamp act, and not a license act. That the imposition of a stamp duty on policies, renewals and receipts, with provisions for avoiding the policy, renewal or receipt in a court of law, if the stamp is not affixed, is not warranted by the terms of sub-section two of section ninety-two, which authorizes the imposition of direct taxation within a province in order to raise a revenue for provincial purposes.[1]

*Temporalities Fund of the Presbyterian Church.*

In pursuance of authority given by the imperial act (16 Vict., c. 21), the province of Canada passed an act (18 Vict., c. 82), in consequence of which, in 1855, an arrangement was made with the government for the erection of a temporalities fund of the Presbyterian church of Canada in connection with the church of Scotland;[2] and an act of incorporation for the management thereof was obtained (22 Vict., c. 66) of the

[1] 3 App. Cas. 1090; Cart., i. 117. On appeal from a judgment of the court of queen's bench of Quebec, affirming a judgment of the superior court of Lower Canada that the act is *ultra vires*. 16 L. C. J., 198; 21 *Ib.* 77; 22 *Ib.* 307. See *infra*, 124, for a later decision upon a Quebec statute imposing taxes on commercial corporations.

[2] This church was entitled to share in the proceeds of the clergy reserves funds by virtue of certain imperial statutes. See *supra*, 32.

province of Canada. In 1874 it was decided to unite the said church with three other churches. Subsequently in the provinces of Ontario and Quebec, the legislatures passed two acts (38 Vict., c. 75, Ont. Stat., and 38 Vict., c. 62, Quebec Stat.), to give effect to this union. At the same time the Quebec legislature passed an act (38 Vict., c. 64) to amend the act of the late province of Canada (22 Vict., c. 66), with a view to the union of the four churches, and to provide for the administration of the temporalities fund. The union was subsequently carried out in accordance with the views of the large majority of the church in question; but a small minority protested against the union, and tested the validity of the Quebec act (38 Vict., c. 64). The matter was finally carried up to the privy council, which decided: That the act (22 Vict., c. 66) of the province of Canada, which created a corporation having its corporate existence and rights in the provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the coming into force of that act, be repealed or modified by the legislature of either of these provinces, or by the conjoint operation of both provincial legislatures, but only by the parliament of the Dominion. That the Quebec act of 1875 (38 Vict., c. 64), which assumed to repeal and amend the act of the late province of Canada, was invalid, inasmuch as its professed object and the effect of its provisions was to destroy, in the first place, a corporation which had been created by the legislature of Canada before the union of 1867, and to substitute a new corporation; and, in the second place, to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the province.[1]

The result of this judgment was the passage of an act by the parliament of Canada in 1882, to amend the act of the late province of Canada (22 Vict., c. 66), with respect to the

[1] 7 App. Cas. 136: Cart., i. 351; Dobie *v.* the Temporalities Board. Appeal on special leave from a judgment of the court of queen's bench (3 L. N., 244), affirming a judgment of the superior court of the district of Montreal (3 L. N., 244); Doutre, 247.

"management of the temporalities fund of the Presbyterian church of Canada, in connection with the church of Scotland," and the acts amending the same.[1]

### *The Sale, Manufacture, Prohibition and Regulation of Intoxicating Liquors.*

Among the most perplexing questions that have come for adjudication before the courts of Canada and judicial committee of the privy council, are controversies as to the powers of the Dominion parliament and the provincial legislatures with respect to the manufacture, sale, prohibition, and regulation of intoxicating liquors. I give below in historical order the most authoritative decisions which have so far been delivered by the courts of last resort with respect to these intricate subjects.

### *The Competency of a Provincial Legislature to License Brewers to Sell Liquor by Wholesale.*

In 1874, the legislature of Ontario passed an act intituled "An act to amend and consolidate the law for the sale of fermented or spirituous liquors."[2] The provisions of this act required that no person should "sell by wholesale or retail any spirituous, fermented, or other manufactured liquors within the province of Ontario, without having first obtained a license under this act, authorizing him to do so." The question was brought before the courts, whether the legislature of Ontario had the power to pass the statute, under which certain penalties were to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale. The matter came finally, on appeal, before the supreme court of Canada,[3] which decided substantially as follows:

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[1] 45 Vict., c. 124. Also, cc. 123 and 125.

[2] 37 Vict., c. 32; Ont. Rev. Stat. (1877), c. 181, ss. 39, 40, 41.

[3] Severn *v.* the Queen, on appeal from queen's bench of Ont.; Can. Sup. C. R., ii., 70; 36 U. C. Q. B., 218.

That it is not within the competency of a provincial legislature to require brewers to take out a license for the sale of fermented or malt liquors by wholesale; that the power to tax and regulate the trade of a brewer, being a matter of excise, the raising of money by "taxation," as well as for the restraint and "regulation of trade and commerce," is comprised within the class of subjects reserved by the ninety-first section of the British North America Act, to the exclusive legislative authority of the parliament of the Dominion; and that such a license, imposed by a provincial statute, is a restraint and regulation of trade, and not an exercise of municipal or police power. That the taxing power of a provincial legislature is confined to direct taxation[1] (sub-s. 2, s. 92), in order to raise a provincial revenue, and to the granting of licenses to shops, saloons, taverns, auctioneers, and "other licenses" for purely local and municipal objects. The majority of the court applied the rule *ejusdem generis* to the foregoing subjects, and were of opinion that the words "other licenses" should be limited to licenses which might be required for objects which were merely municipal or local in their character.

This decision was regarded as binding on all courts in the Dominion until the privy council gave judgment in 1897 in the Brewers' and Maltsters' Association case,[2] wherein they held that an Ontario statute (R. S. O., c. 194, s. 51, sub-s. 2) requiring every brewer, distiller or other person, though duly licensed by the government of Canada for the manufacture and sale of fermented, spirituous and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license therefor, was *ultra vires*. Their lordships not only decided that the license fee imposed upon brewers and distillers which they were dealing with was a direct tax, but went on to say:—Their lordships were not satisfied by the argument of the learned counsel for the appellants, that the license which the enactment renders necessary (sc., a license

[1] So affirmed by the judicial committee of the privy council, Attorney-General of Quebec *v.* the Queen Insurance Co., L. R. 3 App. Cas. 1090.

[2] A. C. (1897), 231, affirming the judgment of the Ont. Court of Appeal, Jan. 4, 1896. See Lefroy, 679, *n.*

on brewers and distillers within the province to sell wholesale) is not a license within the meaning of sub-section 9 of section 92. They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see which is the *genus* which would include "shop, saloon, tavern and auctioneers' licenses, and which would exclude brewers' and distillers' licenses;" "and thus," adds aptly a legal critic, "they destroy the authority of Severn *v.* the Queen upon the one point on which, if any, its authority remains unimpaired."[1]

### *Canada Temperance Act.*

In 1878, the parliament of the Dominion passed an act cited as the "Canada Temperance Act, 1878."[2] The preamble sets forth "that it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces regarding the traffic in intoxicating liquors." The act is divided into three parts, the first of which relates to "proceedings for bringing the second part of this act into force;" the second to "prohibition of traffic in intoxicating liquors;" and the third to "penalties and prosecutions for offences against the second part." The effect of the act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors, in violation of the prohibitions and regulations contained in the act, criminal offences punishable by fine, and for the third or subsequent offence, by imprisonment. The supreme court of New Brunswick in 1879 decided[3] that the act was *ultra vires*, but the supreme court of Canada subsequently held that it was within the competency of the parliament of Canada, and *inter alia* that under the second sub-section of the 91st section of the B. N. A. Act,

[1] See Lefroy, 27 *n*, 679, 723-726.

[2] 41 Vict. c. 16; Rev. Stat. of Can. c. 106.

[3] 3 Pug. and Bur., 139.

"regulation of trade and commerce," parliament alone has the power of regulating the traffic in intoxicating liquors in the Dominion or any part of it.[1] The whole matter came finally before the privy council, who base their decision on grounds which render it unnecessary to discuss the question of trade and commerce. Their lordships considered fully the point whether the act falls within any of the three classes of subjects enumerated in section 92 and assigned exclusively to the provincial legislatures, viz.:

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.

13. Property and civil rights in the province.

16. Generally, all matters of a merely local or private nature in the province.

Their lordships decided that the act does not fall within any of these classes of subjects, for the following reasons: The act is not a fiscal law—a law for raising revenue; on the contrary the effect of it may be to destroy or diminish revenue; and consequently could not have been passed by the provincial legislature by virtue of any authority conferred upon it by sub-section 9. And supposing the effect of the act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion parliament might not pass it by virtue of its general authority "to make laws for the peace, order and good government of Canada." The act does not properly belong to the class of subjects, "property and civil rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. The primary matter dealt with is the public order and safety. Upon the same considerations the act cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the parliament of Canada from declaring and enacting certain uses of property and certain acts in relation to property, to be criminal and

[1] Can. Sup. C. R., vol. iii. 505.

wrongful. Laws designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of parliament, to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the parliament of Canada. Few, if any, laws could be made by the parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it would not have been intended, when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the parliament from the exercise of this general power, whenever any such incidental interference would result from it. Their lordships cannot concur in the view that the act "which in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes and under what conditions spirituous liquors may be sold therein, deals with matters of a merely local nature." On the contrary, the declared object of parliament in passing the act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. The act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part relating to the machinery for bringing the second part into force, took effect and might be put into motion at once and everywhere within it. The conditional application of certain parts of the act does not convert the act itself into legislation affecting a purely local matter.[1] The legislation in question is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the act than a provision in an act for the prevention of contagious diseases

[1] See judgment of Allen, C. J., 3 Pug. and Bur., 139.

in cattle that a public officer should proclaim in what districts it should come into effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.[1]

### *Liquor Traffic in the Provinces.*

The immediate effect of this important judgment on the Temperance Act was the passage by the parliament of Canada, in the session of 1883, of "An act respecting the sale of intoxicating liquors and the issue of licenses therefor." The preamble of the act set forth as the grounds for legislation that "it is desirable to regulate the traffic in the sale of intoxicating liquors; that there should be a uniform law regulating the same throughout the Dominion; that provision should be made for the better preservation of peace and order." The act provided for the issue of licenses to hotels, saloons, shops, vessels and wholesale dealers, and exacted only such fees as are necessary to the execution of the act.[2]

Subsequent to the passage of this act, the judicial committee of the privy council rendered a judgment which had a very important bearing on the question of jurisdiction in the matter of the regulation of liquor traffic in a province, and consequently on the constitutionality of the measure just mentioned. The fourth and fifth sections of the liquor license act[3] of Ontario, which came under the review of the

[1] Judgment of the lords of the judicial committee of the privy council on the appeal of Charles Russell *v.* the Queen, on the information of Woodward, from the supreme court of New Brunswick, delivered 23rd June, 1882. 7 App. Cas., 829; Cart., ii. 12.

[2] 46 Vict., c. 30; (see reference to subject in His Excellency's speech, Jour., 1883, p. 14). But strong objections were taken in the House of Commons to the act, on the ground (as set forth in a resolution) that "the parliament of Canada should not assume jurisdiction, as proposed by the said bill, until the question of jurisdiction had been settled by the court of last resort." Can. Com. J., 1883, May 22. See Can. Hans., May 16, 21 and 22.

[3] R. S. O. (1877) c. 181.

privy council on the appeal of Hodge *v.* the Queen from the court of appeal of the province, authorized the appointment of license commissioners to act in each municipality, and empowered them to pass resolutions for defining the conditions and qualifications requisite to obtain tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law; for regulating licensed taverns and shops; for defining the duties and powers of license inspectors. These commissioners might also impose penalties for an infraction of their resolutions. The sale of intoxicating liquors was also prohibited in the act, under penalties, from Saturday evening, 7 o'clock, to Monday morning, 6 o'clock.

By virtue of this act, the license commissioners of Toronto passed certain resolutions for the regulation of taverns and shops in that city. Subsequently, Mr. Hodge, a proprietor of an hotel, who was duly licensed to sell liquor, and to keep a billiard saloon, was convicted and fined before the police magistrate of Toronto, for unlawfully permitting a billiard table to be used, and a game to be played thereon, during the time prohibited by the act, and by the resolution of the commissioners; that is, after 7 o'clock on Saturday night. The conviction was quashed by the court of queen's bench as illegal. Assuming the right of the legislature of Ontario to legislate on the subject, the court held that it could not devolve or delegate its powers to the discretion of a local board of commissioners. The case was then taken to the court of appeal for Ontario, which reversed the decision of the queen's bench and affirmed the conviction. The court decided substantially that the provincial legislature, and it alone, had the power to pass laws for the infliction of penalties or imprisonment for the enforcement of a law of a province in relation to a matter coming within a class of subjects with which alone the province had the right to deal; and that the

legislature had power to delegate its authority as it had done in the matter in question.[1]

On the question at issue coming before the judicial committee of the privy council, their lordships were of opinion that the decision of the court of appeal of Ontario should be affirmed, and the appeal dismissed with costs. They first reviewed the argument of the appellants that the legislature of Ontario had no power to pass any act to regulate the liquor traffic; that the whole power to pass such an act was conferred on the Dominion parliament, and consequently taken from the provincial legislature by section 91 of the British North America Act; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by section 92. The clause in section 91 which the liquor license act, 1877, was said to infringe, was No. 2, "the regulation of trade and commerce;" and it was urged that the decision of their lordships in Russell *v.* the Queen was conclusive—"that the whole subject of the liquor traffic was given to the Dominion parliament, and consequently taken away from the provincial legislatures." It appeared, however, to their lordships that the decision mentioned "has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the court of appeal." The sole question there was, "whether it was competent for the Dominion parliament, under its general powers, to make laws for the peace, order and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several provinces of the Dominion, or to such parts of the provinces as should locally adopt it." They then proceed to quote portions of the previous judgment in Russell and the Queen to show that the matter of the act in question does not properly belong to the class of subjects "property and civil rights," within the meaning of sub-section 13, but is rather one of those matters relating to public order and safety, which fall within the general authority of parliament to make laws for the order and

[1] See 7 Ont. App. Rep., 246; 46 U. C. Q. B., 141.

good government of Canada.[1] It therefore appeared to their lordships that Russell *v.* the Queen, when properly understood, is not an authority in support of the appellant's contention, and their lordships did not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the Citizens' Insurance Company illustrate is, that "subjects which in one aspect and for one purpose fall within section 93, may in another aspect and for another purpose fall within section 91."[2]

In considering the subject-matter and legislative character of sections four and five of the License Act of Ontario (as given in a previous page) their lordships pointed out that the act "is so far confined in its operations to municipalities in the province of Ontario, and is entirely local in its character and operation." The matters dealt with in the sections mentioned "seem to be of a purely local nature in the province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments." Their lordships consequently decided: "The powers intended to be conferred by the act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce

[1] *Supra*, 95.

[2] In the case of the corporation of Three Rivers and Sulte, the court of queen's bench of Quebec has given a decision, holding precisely in principle what the privy council has held in the Hodge case. See Mr. Justice Ramsay's judgment, 5 L. N., 330. Also Poulin and the corporation of Quebec, 72 Q. L. R., 387; 5 L. N., 3,334; 6 *Ib.* 209, 214. In the first mentioned case the supreme court of Canada (Rep. vol. xi. 25,) sustained the decision of the court of queen's bench of Quebec, and declared the Quebec License Act (41 Vict., c. 3) *intra vires* of the legislature of that province. The case of Hodge *v.* the Queen was considered by the court to cover the constitutional ground.

which belongs to the Dominion parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, sections 4 and 5, seem to come within the heads 8, 15 and 16[1] of section 92 of the British North America Act, 1867. Their lordships are, therefore, of opinion that in relation to sections 4 and 5 of the act in question, the legislature of Ontario acted within the powers conferred upon it by the imperial act of 1867, and that in this respect there is no conflict with the powers of the Dominion parliament."

We have cited, in the foregoing paragraph, the most material part of the decision; but their lordships went further[2] and considered the objection raised by the appellant—that the imperial parliament had conferred no authority on the local legislature to delegate its powers to the license commissioners or any other persons. In other words, that the powers conferred by the imperial parliament on the local legislature should be exercised in full by that body, and by it alone. This objection, in their opinion, is founded on an entire misconception of the true character and position of the provincial legislatures, "which are in no sense delegates of, or acting under any mandate from, the imperial parliament." Their lordships stated emphatically that when the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in section 92, "it conferred powers not in any sense to be exercised by delegation from, or as agents of the imperial parliament, but authority as plenary and as ample within the limits prescribed by section 92, as the imperial parliament,

[1] 8. "Municipal institutions in the province." 15. "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." 16. "Generally all matters of a merely local or private nature in the province."

[2] For text of judgment, see L. N., January 17, 1884; 9 App. Cas., 117.

in the plenitude of its power, possessed and could bestow." Within these limits of subjects and area, "the local legislature is supreme, and has the same authority as the imperial parliament, or the parliament of Canada would have had under like circumstances to confide to a municipal institution or a body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the view of carrying the enactment into operation and effect." In their opinion such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. A legislature, in committing certain regulations to agents or delegates like license commissioners, retains its powers intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands.

The result of this very important judgment was the passage by the Dominion parliament of an act which referred the question of the constitutionality of the Liquor License Act of 1883 to the supreme court of Canada.[1] A special case containing the following questions was accordingly referred by the governor-general in council to the court:

"1. Are the following acts in whole or in part within the legislative authority of the parliament of Canada, namely:

(1) "The Liquor License Act, 1883?

(2) "An Act to amend 'The Liquor License Act, 1883?'

"2. If the court is of opinion that a part or parts only of said acts are within the legislative authority of the parliament of Canada, what part or parts of said acts are so within such legislative authority?"

The court[2] certified to the governor-general-in-council that, in their opinion, the acts referred to them "are, and each of them is, *ultra vires* of the legislative authority of the parliament of Canada, except in so far as the said acts respectively

[1] 47 Vict., c. 32, s. 26.

[2] See 48-49 Vict., c. 74, the schedule of which contains order of reference to, and the judgment of, the supreme court. Mr. Justice Henry was of opinion that "the said acts are *ultra vires* in whole."

purport to legislate respecting those licenses mentioned in section seven of the said 'The Liquor License Act, 1883,' which are there denominated vessel licenses and wholesale licenses, and except also in so far as the acts respectively relate to the carrying into effect of the provisions of 'The Canada Temperance Act, 1878.'" The immediate result of this decision was the suspension of those parts of the Dominion acts declared to be *ultra vires*.[1] Subsequently the question came before the privy council, who decided in favour of the right of the provincial legislatures to deal with the subject-matter of licenses for the sale of liquors.[2]

*The Prohibition of the Sale of Liquors.*

At a later time cognate questions came up for judicial decision. In 1893 the governor-general of Canada submitted[3] to the supreme court of Canada, for hearing and consideration, the following questions, viz.:—

1. Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented or other intoxicating liquors?

2. Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

3. Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

4. Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

5. If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail according to the definition of a sale by retail, either in statutes in force in the province at the time of confederation, or any other definition thereof?

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[1] Dom. Stat. (1885), 48-49 Vict., c. 74.

[2] 8 L. N., 17, 26, 379, 409.

[3] Pursuant to Rev. Stat. c. 135, as am. by s. 4, c. 25, 54-55 Vict.; *supra*, 84.

6. If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act or any of them (Revised Statutes of Canada, chapter 106, section 99)?

And 7. Had the Ontario legislature jurisdiction to enact the 18th section of the act passed by the legislature of Ontario in the 53rd year of her Majesty's reign, and intituled "An Act to improve the Liquor License Acts," as said section is explained by the act passed by the said legislature in the 54th year of her Majesty's reign and intituled "An Act respecting local option in the matter of liquor selling"?

The 18th section of the Ontario Act provided: "The council of every township, city, town and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors in any tavern, inn or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal." The Ontario Act, 54 Vict., sec. 40, provided that the last mentioned 18th section did not intend to affect the provisions of section 252 of the Consolidated Municipal Act of Canada, 29 and 30 Vict., c. 51, which enacted that "no tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received from the importer or manufacturer, provided such packages contain respectively not less than five gallons or one dozen bottles, save in so far as the said section

252 may have been affected by the 9th sub-section of 249 of the same act, and save in so far as licenses for sales in such quantities are required by the Liquor License Act; and the said section 18 and all by-laws which have heretofore been made or shall hereafter be made under the said section 18, and purporting to prohibit the sale by retail of spirituous, fermented or other manufactured liquors, in any tavern, inn or other house or place of public entertainment, and prohibiting altogether the sale thereof in shops and places other than houses of public entertainment, are to be construed as not purporting or intended to affect the provisions contained in the said section 252, save as aforesaid, and as if the said section and the said by-laws had expressly so declared." The matter was heard before five judges of the supreme court, and the questions were all answered in the negative by three of the judges, the other two judges being of opinion that all should be answered in the affirmative except questions 3 and 4.[1]

The lords of the judicial committee of the privy council, to whom the questions at issue were finally submitted, gave a general answer to the seventh question in the affirmative.[2] They were of opinion that the Ontario legislature had jurisdiction to enact section 18, but subject to this necessary qualification—that its provisions "are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886." (See *supra*, p. 94). With respect to the other questions submitted to them their lordships observed that such questions, being in their nature academic rather than judicial, were better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them necessarily depend upon the circumstances in which they may arise for decision, and these circumstances are in this case left to speculation. It must, therefore, be understood that the answers which follow are not meant to

[1] 24 Can. Sup. C. R., 170.

[2] 19 L. N., 185, 199.

have, and cannot have, the weight of a judicial determination except in so far as their lordships might have occasion to refer to the opinions which they had already expressed in discussing the seventh question.

Answers to questions 1 and 2. Their lordships think it sufficient to refer to the opinion expressed by them in disposing of the seventh question.

Answer to question 3. In the absence of conflicting legislation by the parliament of Canada, their lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to question 4. Their lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed, would probably trench upon the exclusive authority of the Dominion parliament.

Answers to questions 5 and 6. Their lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinions upon the points which the questions involve have been sufficiently explained in their answer to the seventh question.

In giving their judgment on the questions arising out of section 18 of the Ontario liquor license law, their lordships were guided by the following reasons: The Dominion parliament has certain powers of legislation for the peace, order and good government of Canada, over and above its enumerated powers specified in section 91, but whereas in the case of its latter powers it is free to deal with any of the matters assigned to the provinces in section 92—all of which are from a provincial point of view, of a local or private nature—wherever such legislation is necessarily incidental to the exercise of its said enumerated powers when legislating under its general power, it may not encroach upon any class of subjects which is exclusively assigned to the provincial legislatures by the said section

92. If, then, such prohibitory liquor legislation as was that of the Canada Temperance Acts of 1878 and 1886, fell within the enumerated Dominion power for the "regulation of trade and commerce," the Dominion parliament would have the exclusive power so to legislate, although in so doing it should interfere with the jurisdiction of the provinces. The object of the Canada Temperance Act, 1886, is not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which the enactments have been adopted by a majority of the local electors. A power to regulate naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view their lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in Municipal Corporation of the City of Toronto *v.* Virgo (1896, App. Cas. 93), in these terms:— "Their lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

As held in Russell *v.* The Queen, it is under its general residuary power of legislation that the Dominion parliament can so legislate. But this being so, such power of legislation does not detract from any provincial power there may be under section 92 to pass a restrictive liquor law. Such a power there is, for "a law which prohibits retail transaction and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or foreign countries, concerns property in the province which would be the subject-matter of the transactions, if they were not prohibitory, and also the civil rights of persons in the province," and such legislation probably falls within No. 13 of section 92, "property

and civil rights in the province"; but if not it would certainly come within No. 16 of section 92, "matters of a merely local or private nature in the province." Such an enactment was section 18 of the Ontario liquor license law, 53 Vict., cap. 56. But as is now settled law, the enactments of the Dominion parliament, in so far as they are within its competency, override provincial legislation, and therefore if, and in so far as the said provincial liquor license law comes into collision with the provisions of the Canada Temperance Act, it must yield to the Dominion act and remain in abeyance until such Dominion act is repealed. Now the provisions of these two pieces of legislation do so conflict that it is obvious that their provisions could not be enforced within the same district or province at one and the same time; and therefore if the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, it might have been necessary to hold that the jurisdiction of the Ontario legislature to pass the act above referred to had been superseded. But by reason of the system of local option embodied in the Canada Temperance Act, this necessity is removed as to districts which have not adopted the Canada Temperance Act, for "The parliament of Canada has not either expressly or by implication enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized, the provincial parliament is to be debarred from exercising the legislative authority given it by section 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled, and it is a great question whether it would be lawful." Even if the provisions of section 18 had been imperative they could not have taken away or impaired the right of any district in Ontario to adopt and thereby bring into force the prohibitions of the Canadian Act.[1]

[1] See able article in Can. L. T. (June, 1896), by Mr. Lefroy. The impossibility of enforcing the Canada Temperance Act has led to an agitation for the passage of prohibitory liquor legislation. The legislature of Ontario in 1893 passed an act (56 Vict., c. 35) to obtain an expression of public opinion with respect to the liquor traffic, and the result was a large majority in favour of prohibition. Both Prince Edward Island and Nova Scotia also gave conclusive

*Fisheries, Harbours and Navigable Waters.*

By sec. 2 of the Fisheries Act of 1868,[1] the minister of marine and fisheries "may, where the exclusive right of fishing does not already exist by law, issue, or authorize to be issued, fishery leases and licenses for fisheries and fishing wheresoever situated, or carried on," etc. In 1874 the minister executed a lease of fishery of a certain portion of a river in New Brunswick which was some forty or fifty miles above the ebb and flow of the tide, though the stream for the greater part of that particular portion is navigable for canoes, small boats and timber. Certain persons in New Brunswick, however, claimed the exclusive right of fishing in this part of the river, on the ground that they had received conveyances thereof, and prevented the lessee of the Dominion government from enjoying the fishery under his lease. The supreme court of Canada was at last called upon to decide whether an exclusive right of fishing existed in the parties who had received the conveyances. In other words, the court was practically asked to decide the question: Can the Dominion parliament authorize the minister of marine and fisheries to issue licenses to parties

majorities in the same way. (For majorities see "Short History" in Johnson's "Statistical Year Book of Canada.") In 1898 the Canadian parliament also submitted the question (under 61 Vict., c. 51) to the electors of the provinces, and the result was a majority of only 14,000 votes in favour of prohibition out of a total vote of 543,049, polled throughout the Dominion. The province of Quebec declared itself against the measure by an overwhelming vote. The prime minister stated to the House of Commons in March, 1899, "that the voice of the electorate, which has been pronounced in favour of prohibition—only twenty-three per cent of the total electoral vote of the Dominion—is not such as to justify the government in introducing a prohibitory law." In the premier's opinion the government would not be justified in following such a course "unless at least one-half of the electorate declared itself at the polls in its favour." (Com. Hans. 1899, i. 95). In the province of Manitoba, where the people have pronounced themselves conclusively in favour of prohibition, the legislature has also quite recently passed an act (Man. Stat. for 1900, c. 22), which has been declared *ultra vires* by the court of king's bench unanimously, and is now (May, 1901,) before the privy council. In fact, despite the various judicial decisions respecting the manufacture, sale and regulation of the liquor traffic, the exact legal rights of the Dominion and the provinces are still involved in much obscurity.

[1] 31 Vict., c. 60.

to fish in rivers such as that described, where the provincial government has before or after confederation granted lands that are bounded on, or that extend across such rivers? The court decided: That the license granted by the minister of marine and fisheries was void, because the act in question only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right belonged to the owners of the land through which that portion of the river flows. That the legislation in regard to "inland and sea fisheries" contemplated by the B. N. A. Act is not with reference to property and civil rights—that is to say, not as to the ownership of the beds of rivers or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern; in other words, all such general laws as enure as well as to the benefit of the owners of the fisheries as to the public at large. That the parliament of the Dominion may properly exercise a general power for the protection and regulation of the fisheries, and may authorize the granting of licenses, where the property, and therefore the right of fishing thereupon, belong to the Dominion, or where such rights do not already exist by law; but it may not interfere with existing exclusive rights of fishing, whether provincial or private. That consequently any lease granted by a Dominion minister to fish in freshwater non-tidal rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal; that where the exclusive right to fish has been acquired as incident to a grant of land through which such river flows, the Canadian parliament has no power to grant a right to fish. That the ungranted lands in a province being in the Crown for the benefit of the people, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license by the minister of marine and fisheries would be illegal.[1]

[1] Can. Sup. C. R., vi. 52 (Queen *v.* Robertson).

But this decision did not by any means settle the various perplexing questions of jurisdiction with respect to fisheries. In 1898 the supreme court of Canada was again called upon to answer certain questions submitted to them by the governor-general-in-council with respect to the jurisdiction of the Dominion parliament to authorize the giving by lease, license, or otherwise, of the right of fishing in navigable or non-navigable lakes, rivers, streams or waters, the beds of which had been granted to private proprietors before confederation, or not having been so granted, are assigned to the provinces under the British North America Act of 1867. As in the case above mentioned, the court held that the legislative authority of the Dominion parliament under section 91, sub-section 12, of the act, is limited to the regulation and conservation of sea coast and inland fisheries, under which it may require that no person shall fish in public waters without a license from the department of marine and fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required, pursuant to Dom. Rev. Stat., c 135, as amended by 55-55 Vict., c. 25, ss. 1, 4, will, however, be merely conferring personal qualification, and will give no exclusive right to fish in a particular locality.[1] But the court reaffirmed their decision in a previous case,[2] that the beds of all harbours are the property of the Dominion,

[1] Can. Sup., C. R., vol. 26, pp. 444-578.

[2] Holman *v.* Green, *Ib.*, vol. 6, p. 707. In this case the court decided that when a grant of part of the foreshore of a natural harbour, used as such by the public, was made by the provincial government of Prince Edward Island, subsequent to the admission of that province into the union, the grant was held to be invalid. In 1898, when the judicial committee gave answers to certain questions with respect to the fisheries, on appeal from the supreme court of Canada (App. Cas., p. 712), their lordships were "of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of a harbour. It may or may not do so according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour, but there are other cases in which, in their lordships' opinion, it would be equally clear that it did not form part of it."

and that as such proprietor the Dominion became the owner of the soil and of the fisheries therein. "The same rule," said Girouard, J., "should be applied to canals, lighthouses, piers, Sable Island ordnance property, lands set apart for general public purposes, and other public works enumerated in the third schedule of the act, and also all lands or public property assumed by the Dominion for fortifications or for the defence of the country under section 117."

The questions at issue between the Dominion and the provinces with respect to harbours and inland fisheries were finally[1] brought before the judicial committee, who decided as follows:

"That whatever proprietary rights were vested in the provinces at the date of the British North America Act, 1867, remained so unless transferred by its express enactments, to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights."

That the transfer by section 108,[2] the third clause of the schedule of the act of the Dominion of "Rivers and Lakes Improvements," operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction, in their lordships' opinion, does no violence to the language employed, and is reasonably and probably in accordance with the intention of the legislature.

That the transfer of "public harbours" operates on whatever is property comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been erected.

With regard to fisheries and fishing rights their lordships held:—

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[1] L. R. App. Cas., 1898, pp., 700, *et seq.*

[2] 108. "The public works and property of each province enumerated in the third schedule of this act shall be the property of Canada." See App. to this book for schedule 3, given incorrectly "schedule 5," in L. R. App. Cas., p. 700.

That section 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, short of transferring them to others.

That a tax by way of license as a condition of the right to fish is within the powers conferred by sub-ss. 3 and 12.[1]

That the same power is conferred on the provincial legislature by s. 92.

That Revised Statutes of Canada, c. 95, s. 4,[2] so far as it empowers the grant of exclusive fishing rights over provincial property, is *ultra vires* of the Dominion.

That Revised Statutes of Ontario, c. 24, s. 47,[3] is *intra vires* the province, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario."

That as regards Ontario Act (1892),[4] the regulations therein which control the manner of fishing are *ultra vires*. Fishing regulations and restrictions are within the exclusive competence of the Dominion, inasmuch as the exclusive legislative authority "of the parliament of Canada extends to sea-coast and inland fisheries" under sub-s. 12, s. 91. But while in their lordships' opinion all restrictions or limitations by which

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[1] Sub-s. 3, "The raising of money by any mode or system of taxation." (Incorrectly given as sub-s. 4 in Law Reports, App. Cas., pp. 701-713). Sub-s. 12, "Sea-coast and Inland Fisheries."

[2] "The minister of marine and fisheries may, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situated or carried on; but leases and licenses for any term exceeding nine years shall be issued only under authority of the governor-in-council." See 31 Vict., c. 60, s. 2.

[3] "It has been heretofore and it shall hereafter be lawful for the lieutenant-governor-in-council to authorize sales or appropriations of land covered with water in the harbours, rivers or other navigable waters in Ontario, under such conditions as it has been or may be deemed requisite to impose, but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water." See R. S. O. (1897), c. 28, s. 49.

[4] 55 Vict., c. 10, "An Act for the protection of Provincial Fisheries." See now R. S. O. (1897), c. 288.

public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, the provincial legislatures are competent to prescribe the mode in which a private fishery is to be conveyed or otherwise disposed of, as falling under the heading of "property and civil rights," within s. 92. So, too, the terms and conditions upon which the fisheries, which are the property of the province, may be granted, leased or otherwise disposed of, and the rights which, consistently with any general regulations respecting fisheries enacted by the Dominion parliament, may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "the management and sale of public lands," or under the class "property and civil rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect to it, and was not intended to be within the scope of the class "fisheries" as that word is used in s. 91.[1] In conclusion, their lordships ruled that they entertain no doubt that the Dominion parliament had power to pass the act intituled "An act respecting certain works constructed in or over navigable waters," inasmuch as it is, in their opinion, clearly legislation relating to navigation.[2] As a result of this decision the governments of Ontario and Quebec, where the inland fisheries are very valuable, have issued licenses, but in other provinces the Dominion authorities continue to administer all fisheries.[3]

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[1] Incorrectly given as s. 92 in L. R. App. Cas., p. 716.

[2] See Dom. Rev. Stat., c. 92. Also sub-s. 10, s. 91, B. N. A. Act, 1867.

[3] In 1899, the minister of marine and fisheries stated in reply to a question put him in the House of Commons with respect to the practical result of the decision reviewed above: "Speaking broadly, it might be taken for granted that while the Dominion government has the exclusive right of making regulations so far as the inland fisheries are concerned, they have no power to issue licenses whatever. Ontario is giving licenses entirely within the boundaries of that province. The province of Quebec is doing the same. With Nova Scotia and New Brunswick an arrangement has been made under which, pending submission of a case to the court to determine the relative powers of the provinces and the Dominion in the waters adjacent to the sea coast—that is, below water mark—we should continue to administer the fisheries this year in those two provinces as we did last." See Com. Hans. for 1899, vol. i., pp. 2910-11.

### *Escheats.*

Among the matters that have come before the supreme court of Canada and the judicial committee of the privy council, is the question whether the government of Canada or the government of a province is entitled to estates escheated to the Crown for want of heirs. The controversy on this question first arose in 1874, when the legislature of Ontario passed an act[1] to amend the law respecting escheats and forfeitures. This act was disallowed by the governor-general-in-council, on the report[2] of the minister of justice (Mr. Fournier, later one of the judges of the supreme court) on the following grounds:

1. "That escheat is a matter of prerogative which is not by the British North America Act vested in a provincial government or legislature.

2. "That it is not one of the subjects coming within the enumeration of the subjects left exclusively to the provincial legislatures.

3. "That a provincial legislature, by its very statutable position, has no power to deal with prerogatives of the Crown.

4. "That the lieutenant-governor has not under the statute, or by his commission, any power to deal with the prerogatives of the Crown; and not being empowered to assent in the Queen's name to any law of a provincial legislature, he cannot bind her Majesty's prerogative rights."

Subsequently in 1876, by a decision of the court of queen's bench of the province of Quebec, upon an appeal from a lower court, the right of the province to the control of escheats and forfeitures, within the province, was affirmed. Whereupon it was agreed between the Dominion and provincial governments that—until or unless there should be a judicial decision establishing a contrary principle—"lands and personal property in any province, escheated or forfeited by reason of intestacy, without lawful heirs or next of kin, or other parties entitled to succeed, are subjects appertaining to the province, and within its legislative competency," while, on the other hand, "lands and personal property forfeited to the Crown for

[1] 37 Vict., c. 8.

[2] Can. Sess. P., 1882, No. 141.

treason, felony, or the like, are subjects appertaining to the Dominion, and within its legislative competence."[1]

Accordingly the legislature of Ontario again passed an act,[2] which enables the attorney-general to take possession of escheated lands or cause an action of ejectment to be brought for the recovery thereof, without any inquisition being first necessary. The lieutenant-governor may make grants of escheated or forfeited lands, or may release forfeited property, or waive the forfeiture. He may also make an assignment of personalty to which the Crown has become entitled.

The question of the validity of this statute was brought before the courts in 1878, when the attorney-general of Ontario filed an information in the court of chancery for the purpose of obtaining possession of land in the city of Toronto, which was the property of one Andrew Mercer, who had died intestate and without leaving any heirs or next of kin, on the ground that it had escheated to the Crown for the benefit of the province. Andrew F. Mercer, a natural son of the deceased, demurred to this information for want of equity, and the court of chancery held that the Escheat Act of Ontario[3] was not *ultra vires*, but that the escheated property accrued to the benefit of Ontario. On appeal to the court of appeal for Ontario, that court held that the provincial governments are entitled, under the B. N. A. Act, to recover and appropriate escheats, and affirmed the order over-ruling the said demurrer, and dismissed the appeal with costs. Against this judgment the defendant, Andrew F. Mercer, appealed to the supreme court, and the parties agreed that the appeal should be limited to the broad question whether the government of Canada or of a province is entitled to estates escheated to the Crown. The Dominion government, concurring in the view

[1] Can. Sess. P., 1877, No. 89, pp. 88-105.

[2] R. S. O. (1877), c. 94 (40 Vict., c. 3). The legislature of New Brunswick passed a law to the same effect in 1877, c. 9. See also Quebec Act, 48 Vict., c. 10 (Rev. Stat. of 1888, ss. 1369-1373), passed after the privy council's decision stated in the text. Also Nova Scotia Rev. Stat., 5th series, c. 127.

[3] R. S. O. (1877), c. 94.

of the appellant's counsel, that the hereditary revenues of the Crown belong to the Dominion, intervened in order to have the question determined.

The supreme court held that the province of Ontario does not represent her Majesty in matters of escheat in that province, and therefore the attorney-general could not appropriate the property escheated to the Crown in this case for the purposes of the province, and that the Escheat Act of Ontario was *ultra vires*.[1] That any revenue derived from escheats is by section 102 of the B. N. A. Act placed under the control of the parliament of Canada, as part of the consolidated revenue fund of Canada, and no other part of the act exempts it from that disposition.[2]

The case was brought finally before the privy council,[3] who came to the conclusion that the escheat in question belongs to the province of Ontario. Their lordships base their decision mainly on their interpretation of section 109, which is the only clause in the B. N. A. Act by which any sources of revenue appear to be distinctly reserved to the provinces, viz:

"All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

The real question, in their lordships' opinion, is as to the effect of the words "lands, mines, minerals and royalties" taken together. They see no reason why the word "royalties" in the context should not have its primary and appropriate sense as to all the subjects with which it is here associated—lands, as well as mines and minerals. Even as to mines and minerals, it here necessarily signifies rights belonging to the Crown, *jure coronæ*. The general subject of the section is of

[1] Can. Sup. C. R. v., 538. The chief justice and another judge of the court dissented from the opinion of the majority.

[2] Per Fournier, Taschereau and Gwynne, J. J.

[3] The attorney-general of Ontario *v.* Mercer; July 18, 1883.

a high political nature; it is the attribution of royal territorial rights, for the purposes of revenue and government, to the provinces in which they are situate or arise. In its primary and natural sense, "royalties" is merely the English translation or equivalent of *regalitates, jura regalia, jura regia.* It stands on the same footing as the right to escheats, to the land between high and low watermark, to treasure trove and other analogous rights. Their lordships find nothing in the subject or the context, or in any other part of the act, to justify a restriction of its sense to the exclusion of royalties, such as escheats in respect of lands. The larger interpretation, in their opinion, certainly includes all other ordinary territorial revenues of the Crown arising within the respective provinces.[1]

*Precious Metals' Case.*

An analogous question came before the judicial committee in 1889, in connection with the above-mentioned case.[2] Here their lordships held:—That British Columbia, having agreed by the 11th article of union, to convey, and having accordingly granted by statute to the Dominion parliament, certain "public lands" in trust to be appropriated in furtherance of the construction of the Canadian Pacific Railway—this not being matter of a separate and independent compact, but part of the general statutory arrangement, of which the leading enactment was that on its admission to the federal union, British Columbia should retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenue between the province and the Dominion, the 11th article of union being nothing more than an exception from these provisions, though the expression "land" admittedly carried with it the baser metals, they being incidents of lands—it should be interpreted under the circumstances as derogating from the provincial right to "royalties" connected with mines and minerals, *e.g.*,

[1] 6 L. N. 233, 244. Also Can. Sess. P., 1884.

[2] 14 App. Cas. 295; Cart. (1889), iv., 241.

mines of gold and other precious metals. Therefore they held that the precious metals within the lands in question remained vested in the Crown, subject to the control and disposal of the government of British Columbia.

### *Question respecting Indian Lands.*

An important question came before the supreme court of Canada in 1887, on the appeal of the Ontario court of appeal, affirming a judgment of the chancery division, which restrained the St. Catharines Milling & Lumber Co. from cutting timber on lands south of Wabigoon Lake in Algoma, claimed to be public lands of the province.[1] The question was really whether certain lands admittedly within the boundaries of Ontario belonged to that province or to the Dominion of Canada. By royal proclamation in 1763,[2] possession was granted to certain Indian tribes of these lands, "of such parts of our dominion and territories," as not having been ceded or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until the date under the foregoing proclamation, were, to the extent of the whole right and title of the Indian inhabitants thereto, surrendered to the government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing.[3] In the answer of the defendants it was pleaded that the lands and timber thereon were, with other lands and timber in the district, until quite

[1] Sup. Can. R., vol. 13, pp. 577-677. The St. Catharines Milling & Lumber Co. (appellants), and the Queen, on the information of the attorney-general for the province of Ontario (respondent), on appeal from the court of appeal for Ontario.

[2] *Supra*, 8.

[3] These lands formed a portion of the territory declared under the Boundary Award to be in Ontario, *supra*, 77.

recently claimed by the Indians who inhabited that part of the Dominion of Canada. That the claims of such Indians have always been acknowledged by the various governments of Canada, and that such claims are, as respects the lands in question, paramount to the claim of the Crown as represented by the government of Ontario. That the government of Canada have acquired the Indian title to these lands in consideration of a large expenditure of money for the benefit of these Indians, and have for that reason and by virtue of the inherent right of the Crown as represented by the government of Canada, alone the right to grant licenses to cut timber on the tract in dispute. For the province of Ontario it was contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the province, the beneficial interest therein passed to the province under the act of 1867, and the Dominion obtained thereunder no such interest as it claimed in the suit. Even if they were lands reserved for the Indians within the meaning of the act, the Dominion gained thereunder only a power of legislating in respect to them; it did not gain ownership or a right to become owner by purchase from the Indians. The majority of the court[1] decided that the boundary of the territory in the northwest angle being established, and the lands in question being found within the province of Ontario, they necessarily form part of the public domain of that section, and are public lands belonging to the same by virtue of sub-sec. 5 of sec. 92, and sec. 109 of the B. N. A. Act, as to lands, mines, minerals and royalties, and of sec. 117, by which the provinces are to retain all their property not otherwise disposed of by that act, subject to the right of the Dominion to assume any lands or public property required for fortifications or for the

[1] Ritchie, C. J., Taschereau and Henry, J. J.; Strong and Gwynne, J. J., dissenting. The most elaborate opinion on the whole question is by Boyd, C., in the chancery division in the high court of justice for Ontario (10 O. R., 196). The opinions of Strong and Gwynne, J.J., on the other side merit a careful study.

defence of the country.[1] Only those lands specifically set apart and reserved for the use of the Indians are "lands reserved for Indians" within the meaning of sec. 91, item 24, of the B.N.A. Act. In the course of their opinions, the majority of the judges dwelt on certain points interesting to the historical as well as to the legal student. They laid it down that "on the discovery of the American continent, the principle was asserted or acknowledged by all European nations that discovery followed by active possession gave title to the soil to the government by whose subjects, or by whose authority, it was made, not only against other European governments, but against the natives themselves. While the different nations of Europe respected the rights[2] of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves."[3] That such was the case with the French government in Canada, during its occupancy thereof, is an incontrovertible fact. The king was vested with the ownership of all the ungranted lands in the colony as part of the Crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession.[4] When, by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, it is unquestionable that the full title of the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the Crown domain, in as full and ample a manner as the king of France had previously owned it. At no time had the sovereign of Great Britain ever divested himself of the ownership of the public lands to vest it in the Indians. For obvious political reasons and motives of humanity and benevolence, it has, no doubt, been the general policy of the Crown, as it had been at the times of the French authorities, to respect the claims of the Indians.

[1] See app. A to this work for text of these sections.

[2] Judge Taschereau (643) very properly thought "claims" the proper word here.

[3] Sup. Court of Louisiana (cited by Taschereau, J.), 4, La. An. 141.

[4] Taschereau, J., 644.

But this, though it unquestionably gives them a title to the favourable consideration of the government, does not give them any title in law—any title that a court of justice can recognize as against the Crown.[1]

The privy council, in affirming the judgment of the supreme court of Canada, held that by force of the proclamation of 1763 the tenure of the Indians was a personal and usufructuary right dependent upon the good will of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was "an interest other than that of the province in the same," within the meaning of section 109. Their lordships also held that by force of the surrender in 1873 the entire beneficial interest in the lands subject to the privilege was transmitted to the province in terms of section 109; and that the Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the province therein. The treaty of 1873 "left the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully invested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that province."

*Indian Claims' Case.*

It is useful to constitutional students to notice here that in the Indian claims'[2] case, which involved the interpretation of the words of section 109 (see *supra*, p. 117), "subject to any trusts existing in respect thereof and to any interest other than that of the province" in the same, their lordships held:

[1] Taschereau, J., 648, 649. See also opinion of Henry, J., 639.

[2] App. Cas. (1896); Lefroy, 612-614. In the course of the argument Lord Watson expressed the opinion: "If the Crown right was subject to a burden upon the land, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown. I think the whole effect of this clause (109) is to appropriate to the province of Ontario all the interest in lands within that province as vested in the Crown, subject to all the conditions under which they were vested in the Crown." *Ib.* 612 *n.*

"The expressions, 'subject to any trusts in respect thereof' and 'subject to any interest other than that of the province,' appear to their lordships to be intended to refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment out of one or other of these of the debt due to the creditors to whom that duty ought to be fulfilled. On the other hand, 'an interest other than that of the province in the same,' appears to them to denote some right or interest in a third party, independent and capable of being vindicated in competition with the beneficial interest of the whole province. Their lordships have been unable to discover any reasonable grounds for holding that by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities . . . Their lordships have had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the province, and that no duty was imposed upon the province, whether in the nature of a trust, obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.[1]

[1] 14 App. Cas. v., 46-61. Seeing that the benefit of the surrender accrues to Ontario, their lordships gave their opinion that that province must, "of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by her Majesty, and which are said to have been in part fulfilled by the Dominion government."

*Taxes on Incorporated Companies.*

In 1882 the Quebec legislature passed a statute[1] "to impose certain direct taxes" on banks, insurance companies, and every incorporated company carrying on any labour, trade or business in the province. Payment was resisted of the taxes thereby imposed, and the queen's bench reversed a decision of the superior court that the Quebec legislature had no power to pass the statute, on the grounds that the tax is a direct one and that it is also a matter of a local or private nature in the province, and so falls within the jurisdiction of the provincial legislature. The case was carried before the judicial committee of the privy council, who affirmed the judgment of the queen's bench that the tax in question was direct taxation within class two of section ninety-two of the federation act. They also laid it down that a corporation doing business in the province is subject to taxation under section 92, ss. 2, though all the shareholders are domiciled or resident out of the province.

In giving their opinion in answer to an argument that a legislature might lay taxes so heavy as to crush a bank and nullify the power of parliament to establish such institutions, their lordships said: "People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes; they have to construe the express words of an act of parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provide for the federated provinces a carefully balanced constitution, under which no one of the parts can make laws for itself, except under the control of the whole acting through the governor-general. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due consideration of the act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may

[1] 45 Vict. (Q.), c. 22.

be abused or may limit the range which otherwise would be open to the Dominion parliament."[1]

### *Education.*

Among the difficult questions that have been discussed in parliament and argued before the courts are those arising out of the provisions in the British North America Act relating to education.[2] This act allows the legislature of each province to make laws exclusively in relation to education, but at the same time protects denominational or dissentient schools by giving authority to the Dominion government to disallow an act clearly infringing the rights or privileges of a religious minority, or to obtain remedial legislation from parliament, according to the circumstances of the case. From 1871 until 1875 the Dominion government was pressed by the Roman Catholic inhabitants of New Brunswick to disallow an act passed by the provincial legislature in relation to common schools, on the ground that it was an infringement of certain rights which they enjoyed as a religious body at the time of confederation. The question not only came before the courts of New Brunswick and the Canadian House of Commons, but was also submitted to the judicial committee of the imperial privy council, but only with the result of showing beyond question that the objectionable legislation was clearly within the jurisdiction of the legislature of New Brunswick, and could not be constitutionally disallowed by the Dominion government on the ground that it violated any right or privilege enjoyed by the Roman Catholics at the time of union.[3]

A far more difficult question respecting education arose in Manitoba. It appears that, prior to the formation of Manitoba in 1870, there was not in the province any public system

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[1] Bank of Toronto, *et al.*, *v.* Lambe, 12 App. Cas., 587; 4 Cart. (1887), 23, Lefroy reviews this important case in all its aspects.

[2] See app. A, s. 93.

[3] For a succinct review of this case see Todd's Parl. Govt. in B. C., 2nd ed., pp. 458-463.

of education, but the several religious denominations had established such schools as they thought fit to maintain by means of funds voluntarily contributed by members of their own communion. In 1871 the legislature of Manitoba established an educational system distinctly denominational. In 1890 this law was repealed, and the legislature established a system of strictly non-sectarian schools. The Roman Catholic minority of the province was deeply aggrieved at what they considered a violation of the rights and privileges which they enjoyed under the terms of union adopted in 1870. The first sub-section of the twenty-second section of the act of 1870 set forth that the legislature of the province could not pass any law with regard to schools which might "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the province at the time of union." The dispute was brought before the courts of Canada, and finally before the judicial committee of the privy council, which decided that the legislation of 1890 was constitutional, inasmuch as the only right or privilege which the Roman Catholics then possessed "by law or practice" was the right or privilege of establishing and maintaining for the use of members of their own church such schools as they pleased. The Roman Catholic minority then availed themselves of another provision of the twenty-second section of the Manitoba act, which allows an appeal to the governor-in-council "from any act or decision of the legislature of the province or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

The ultimate result of this reference was a judgment of the judicial committee to the effect that the appeal was well founded, and that the governor-in-council had jurisdiction in the premises, but the committee added that "the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute." The third subsection of the twenty-second section of the Manitoba Act—a repetition of the provision of the British North America Act

with respect to denominational schools in the old provinces—provides not only for the action of the governor-in-council in case a remedy is not supplied by the proper provincial authority for the removal of a grievance on the part of a religious minority, but also for the making of "remedial laws" by the parliament of Canada for the "due execution" of the provision protecting denominational schools. In accordance with this provision Sir Mackenzie Bowell's government passed an order-in-council on the 21st March, 1895, calling upon the government of Manitoba to take the necessary measures to restore to the Roman Catholic minority such rights and privileges as were declared by the highest court of the empire to have been taken away from them. The Manitoba government not only refused to move in the matter, but expressed its determination "to resist unitedly by every constitutional means any such attempt to interfere with their provincial autonomy." The government introduced a remedial bill in the House of Commons during the first session of 1896, but it was opposed with great earnestness and never became law.[1] The elections that followed led to a change of government and the passage of a statute by the Manitoba legislature in the direction of giving the French Catholics of the province some facilities for learning their language and receiving religious instruction in the public schools.[2]

### *Powers and Privileges of the Governments and Legislatures of the Provinces.*

Since 1867, the courts have given several important decisions which have settled doubts which had arisen as to the status of the lieutenant-governors, and as to the powers and privileges of the legislatures of the provinces. In one notable case the question how far a lieutenant-governor is the repre-

[1] For history of this vexed question see Todd's Parl. Gov. in B. C., 2nd ed., pp. 465-478; Can. Com. Sess. P., 1895, which includes remedial order; Com. Hans. for 1896.

[2] Man. Stat. for 1897, 60 Vict., c. 27. See remarks of Sir W. Laurier (prime minister) on this compromise, in Com. Hans. for 1897, pp. 63-66

sentative of the sovereign was considered and placed beyond dispute. The judicial committee of the privy council have set forth: That by section 58 of the British North America Act, 1867, the appointment of a provincial governor is made by the governor-general-in-council, by instrument under the great seal of Canada, or in other words, by the executive government of the Dominion, which is, by section 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no power and no functions except as representatives of the Crown. The act of the governor-general and his council in making the appointment was, within the statute, the act of the Crown; and a lieutenant-governor, when appointed, is as much the representative of the Crown for all purposes of provincial government as the governor-general himself is for all purposes of Dominion government.[1]

This decision of the privy council has also a direct application to a legal controversy which existed for several years between the Dominion and provincial governments, as to the right of making queen's (now king's) counsel—the exclusive right having been claimed by the Dominion government as a prerogative of the Crown, to be exercised by the governor-general, and so upheld by some of the judges of the supreme court of Canada in the case of Lenoir and Ritchie in 1879.[2] The question came before the judicial committee of the privy council in 1897, on appeal from a judgment of the court of appeal of Ontario, who had decided unanimously in favour of the provincial view. Their lordships held that, according to

[1] See Privy Council in "The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick." App. Cas. (1892), 443; Lefroy, 93, 94.

[2] Can. Sup. C. R., iii., 575; Cart., i., 488. See a report of Sir Oliver Mowat, when minister of justice in 1896 (L. N., 1896, p. 284), recommending the rescinding of certain appointments made by a previous government, and the deferring of all appointments until a judicial decision was attained on the question at issue.

the true construction of the British North America Act, 1867, s. 92, sub-ss. I., 4, 14,[1] chapter 39 of the Revised Statutes of Ontario, 1877, which empowers the lieutenant-governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, was *intra vires* of the provincial legislature.[2] As a result of this decision the federal government's power to appoint king's counsel is confined to the federal courts, while the provincial governments' power is limited to the provincial courts.

In the Pardoning Power case it has been held that the Ontario Act, 51 Vict., c. 5, which purports to vest in the lieutenant-governor for the time being, amongst other powers, the power of commuting and remitting sentences for offences against the law of the province, or offences over which the legislative authority of the province extends, was *intra vires*.[3] The supreme court of Canada, before whom the question of the validity of the Ontario act came for argument, were influenced by the decision in the case of the Maritime Bank, which practically settles doubts as to the right of a lieutenant-governor to represent the Crown. The court dismissed the appeal mainly on the ground that in view of the terms and conditions of the act in doubt "it was impossible to say that the powers to be exercised under that act by the lieutenant-governor are unconstitutional."[4]

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[1] S. 92, sub-s. 1: "The amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant-governor." Sub-s. 4: "The establishment and tenure of provincial offices, and the appointment and payment of provincial officers." Sub-s. 14: "The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

[2] L. R., App. Cas. (1898), 247-255.

[3] Boyd, Chancellor, 20 Ont. Rep. (1890), 254; affirmed by the Ontario Court of Appeal, 6 A. R., 31.

[4] Can. Sup. C. R. xxiii., 458.

### *Privileges of Provincial Legislatures.*

The question of the extent of the privileges of the legislative assemblies of the provinces of Canada has also come before the courts of the Dominion and the privy council. Immediately after confederation, the legislatures of Ontario and Quebec passed acts to give the respective houses such privileges and powers as are held by the Senate and House of Commons of Canada.[1] When these statutes were disallowed as *ultra vires* by the governor-general-in-council,[2] the legislatures passed other acts more clearly defining their respective privileges.[3] These acts were left to go into effect, and the court of queen's bench in Quebec decided that the statute of that province was *ultra vires*.[4] In 1874 a Manitoba act was disallowed, but a subsequent statute was permitted to come into operation.[5]

The action of the respective provincial legislatures in passing statutes respecting their privileges and powers was subsequently justified by a decision of the supreme court of Canada with respect to a difficulty that arose in the house of assembly of Nova Scotia. It appears that Mr. Woodworth, a member of the house of assembly of Nova Scotia, on the 16th of April, 1874, charged the provincial secretary of the day—without being called to order for doing so—with having falsified a record. The charge was subsequently investigated by a committee of the house, who reported that it was unfounded. Two days later the house resolved that in preferring the charge without sufficient evidence to sustain it, Mr. Woodworth was guilty of a breach of privilege. On the 30th of April, Mr. Woodworth was ordered to make an apology dictated by

[1] Ont. Stat., 32 Vict., c. 3. Quebec Stat., 32 Vict., c. 4.

[2] Can. Sess. P. (1877), No. 89, pp. 202-212, 221; Todd's Parl. Govt. in B. C., 2nd ed., 522 *et seq.*

[3] Ont. Stat., 39 Vict., c. 9. Quebec Stat., 33 Vict., c. 5. See Q. Rev. Stat., art. 128, am. by 61 Vict., c. 12.

[4] Dansereau, *ex parte;* 19 L. C. J. 210, Cart., ii., 165. Consult also Can. Sess. P., 1877, No. 89, pp. 108-14, 201, for opinions of Dominion authorities.

[5] Man Stat. (1873), c. 2; *Ib.* (1876), c. 12; Can. Sess. P., 1877, No. 89, pp. 44-47, 106-9.

the house, and, having refused to do so, was declared, by another resolution, guilty of a contempt of the house, and requested forthwith to withdraw until such apology should be made. Mr. Woodworth declined to withdraw, whereupon another resolution was passed ordering the removal of Mr. Woodworth from the house by the serjeant-at-arms, who with his assistant, enforced the order and removed Mr. Woodworth, who soon afterwards brought an action of trespass for assault against the speaker and certain members of the house, and obtained a verdict of $500 damages. The supreme court held, on appeal, affirming the judgment of the supreme court of Nova Scotia, that the legislative assembly of Nova Scotia had no power to punish for any offence not an immediate obstruction to the due course of its proceedings, and the proper exercise of its functions, such power not being an essential attribute, nor essentially necessary for the exercise of its functions by a local legislature, and not belonging to it as a necessary or legal incident; and that, without prescription or statute, local legislatures have not the privileges which belong to the House of Commons of Great Britain by the *lex et consuetudo Parliamenti*. The allegations and circumstances shown in the case in question afforded, in its opinion, no justification for the plaintiff's removal; he was not then guilty of disorderly conduct in the house, or interfering with or in any way obstructing the deliberations or business, or preventing the proper action of the house, or doing any act rendering it necessary, for self-preservation or maintenance of good order, that he should be removed.[1]

An act passed by the Nova Scotia legislature in 1876, while the foregoing action of Landers *v.* Woodworth was pending, also came under review of the judicial committee of the privy

[1] Can. Sup. C. R., ii., 158-215. Kielly *v.* Carson (4 Moore P. C. C. 63), and Doyle *v.* Falconer (L. R. 1 P. C., App. 328), were commented upon by the court and followed. The learned chief justice cited these and other cases bearing on the question, viz., Beaumont and Barrett (1 Moore P. C. C., p. 59); Fenton and Hampton (11 Moore, 347); Cuvillier *v.* Monro (4 L. C. R, 146); Lavoie's case (5 L. C. R, p. 99); Dill *v.* Murphy (1 Moore P. C., C. N. S., 487); *ex parte* Dansereau, Low. Can. Jurist, vol. xix. 210-248.

council in 1896. By the Nova Scotia act it was declared that no member shall be liable to any civil action by reason of anything brought by petition, bill, etc., before the house. The following acts are prohibited, amongst others: Insults to or assaults upon members during the session. Each house to be a court of record, with power to adjudicate upon and punish offences under the statute. Offenders to be liable to imprisonment. The plaintiff intentionally disobeyed the order of the house to attend before the house, and was arrested by the serjeant-at-arms and imprisoned, under order of the house. Being released under a writ of *habeas corpus*, he brought an action against certain members for assault and imprisonment. Judgment went for the plaintiff. On appeal to the supreme court of Nova Scotia the court was equally divided, and the judgment affirmed. This appeal was then taken to the privy council and the judgment was reversed, on the ground that the provincial act was *intra vires*. Their lordships held: That local legislatures existing at the time had authority prior to confederation to make laws respecting their constitution, powers and procedure, and to punish for contempt and disobedience of their orders. That even if this power did not then exist, the British North America Act, 1867, by section 92, conferred power on the local legislature to pass acts for defining their powers and privileges, and that consequently the protection of members from insult, as set forth in the Nova Scotia statute, was clearly part of the constitutional law of the province. That the legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within the reach of the criminal law. Finally, that the prohibition in the statute against bringing a civil action against any member was a complete bar to the action.[1]

To make this historical review complete, I may add that the legislatures of New Brunswick, Prince Edward Island and

[1] L. N. (1896), 228-235, App. Cas., 600; consult Lefroy, 742-750.

British Columbia have also passed statutes respecting their powers and privileges.[1]

**III. Rules of Construction and Constitutional Principles laid down by the Courts.**—The foregoing review clearly shows the difficulties that have arisen in the construction of the provisions of the British North America Act, relating to the distribution of legislative powers between the parliament of Canada and the legislatures of the provinces, owing to the very general language in which some of those powers are described. The nearest approach to a rule of general application that has been attempted in the courts of Canada, with a view to reconcile the apparently conflicting legislative powers under the act, is with respect to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion. But while the legislative rights of the local legislatures are, in this sense, subordinate to the rights of the Dominion parliament, these latter must be exercised, so far as may be, consistently with the rights of the local legislatures, and therefore the Dominion parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of Canada.[2]

The judicial committee of the privy council have endeavoured to lay down certain principles which should guide those who are called upon to interpret the Union Act. The first step to be taken, with a view to test the validity of an act of

[1] N. B. Stat., 53 Vict., c. 6; P. E. I. Stat., 53 Vict., c. 4, s. 110; Rev. Stat. of B. C. (1897), c. 118.

[2] Ritchie, C. J., in The Queen *v.* Robertson, Can. Sup. C. R., vol. vi., 110-11. Also, Valin *v.* Langlois, vol. iii., 15; The Citizens Insurance Co. *v.* Parsons, vol. iv., 242. See remarks of Sir M. E. Smith in Cushing *v.* Dupuy, 5 App. Cas. 415; Cart. i., 258, with respect to bankruptcy and insolvency.

a provincial legislature, is to consider whether the subject-matter falls within any of the classes of subjects enumerated in section ninety-two, which states the legislative powers of the provincial legislatures. If it does not come within any of such classes, the provincial act is of no validity. If it does, these further questions may arise, viz., whether the subject of the act does not only fall within one of the enumerated classes of subjects in section ninety-one, which states the legislative power of the Dominion parliament, and whether the power of the provincial legislature is, or is not, thereby overborne.[1]

The same eminent authority has in another judgment[2] expressed the following opinion:

"That it must have been foreseen that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into, and were embraced by, some of the enumerated classes of subjects in section ninety-one; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the ninety-first section, 'for greater certainty, but so as to restrict the generality of the foregoing terms of this section,' that (notwithstanding anything in the act) the exclusive authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. Notwithstanding this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not

[1] Dobie *v.* The Temporalities Board of the Presbyterian Church in Canada, 7 App. Cas., 136; Cart., i., 367. In Steadman *v.* Robertson (2 Pug. and Bur., 580) one of the judges of the supreme court of New Brunswick expressed the opinion: "The B. N. A. Act is distributive merely in respect to powers of legislation exercisable by the Dominion parliament and by the local legislatures respectively, and the Dominion parliament may not intrench upon property and civil rights which are under the guardianship and subject to the power of the local legislatures, except to the extent that may be required to enable parliament to 'work out' the legislation upon the particular subject specially delegated to it."

[2] The Citizens & Queen Insurance Co. *v.* Parsons, Rep. 45, L. T. N. S. 721; Cart., i., 271-273.

have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. Take as one instance the subject 'marriage and divorce,' contained in the enumeration of subjects in section ninety-one. It is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section ninety-two, and no one can doubt, notwithstanding the general language of section ninety-one, that this subject is still within the exclusive authority of the legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in section ninety-one; but though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by section ninety-two, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section ninety-one, legislative power may reside as to some matters, falling within the general description of these subjects, in the legislatures of the provinces. In these cases, it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define, in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist, and, in order to prevent such a result; the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain, and give effect to all of them."

In giving a summary of the most important judicial decisions on questions of legislative jurisdiction, the writer has thought

it the wisest course in a work of this character to allow the reader to study out each subject for himself and form his own conclusions in matters of doubt. In reviewing these decisions, however, certain constitutional principles may be evolved for the guidance of those engaged in the working out of the federal system of the Dominion, and to some of these the writer may now appropriately refer.

The object of the British North America Act of 1867 is neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should be represented—a government entrusted with the exclusive administration of affairs in which they all have a common interest, while each province retains its independence and autonomy. That object is accomplished by distributing between the Dominion and the provinces all executive and legislative powers and all public property and revenues which had previously belonged to the provinces, so that the Dominion government should be vested with such of those powers, property and revenues as are necessary for the performance of its constitutional functions, and that the remainder should be retained by the provinces for the purpose of provincial governments.[1]

The Dominion parliament and the provincial legislatures are sovereign bodies within their respective constitutional limits. While the Dominion parliament has entrusted to it a jurisdiction over matters of national import, and possesses besides a general power to legislate on matters not specifically reserved to the local legislatures, the latter nevertheless have had conferred upon them powers as plenary and ample within the limits prescribed by the constitutional law as are possessed by the general parliament.[2]

In interpreting the constitution, prescribing the limits of the respective legislative authorities in the Dominion, every care should be taken to consider each case as it arises, and to

[1] Privy Council in "The Liquidators of the Maritime Bank of Canada" *v.* The Receiver-General of New Brunswick, App. Cas. (1892), 441-2.

[2] *Supra*, 101, 102.

determine the true nature and character of the legislation in the particular instance under discussion in order to ascertain the class of subjects to which it really belongs.[1]

In all cases, each legislative body should act within the sphere of its clearly defined powers; and the Dominion parliament should no more extend the limits of its jurisdiction by the generality of the application of its law, than a local legislature should extend its jurisdiction by localizing the application of its own statute.[2]

The parliament of Canada has a right to interfere with matters of property, civil rights and procedure in a province, when it is necessary for the purpose of legislating generally and effectually in relation to matters which fall properly within the jurisdiction of the general legislature.[3]

The federal parliament must have "a free and unfettered exercise of its powers" with respect to matters placed under its control, even though such exercise may interfere with some of the powers left under provincial control.[4] The exercise of the powers of the local legislatures, in those cases, must necessarily be subject to such regulations as the Dominion may lawfully prescribe.[5]

But it is reasonable to assume that the right of the federal parliament to legislate in this particular is limited to such legislation as is absolutely necessary to give full effect to its lawful powers. It cannot be argued from the most strained interpretation of the constitution that the federal legislature should, in the exercise, for instance, of its general power to regulate trade and commerce, or to provide for the peace, order or good government of Canada, obliterate the jurisdiction of the local legislatures over matters of a purely pro-

[1] *Supra*, 134, 135.

[2] Legal News on Hodge *v.* the Queen, Jan. 26, 1884. See remarks of Taschereau, J., Can. Sup. C. R., iv., 310.

[3] *Supra*, 133.

[4] Can. Sup. C. R., iv., 308, Taschereau, J.

[5] *Ib.* 242, Ritchie, C. J.

vincial or municipal character, or assume full control over civil rights and property.[1]

The exercise of legislative power by the parliament of Canada in regard to all matters not enumerated in section 92, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the parliament of Canada by section 91, would not only be contrary to the intendment of the act, but would practically destroy the autonomy of the provinces. If it were once conceded that the parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures. No doubt some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the parliament of Canada. An act restricting the right to carry weapons of offence, or their sale to young persons within the province, would be within the authority of the provincial legislature; but traffic in arms, or the possession of them in such circumstances as to raise a suspicion that they were to be used for seditious purposes or against a foreign state, are

[1] Can. Sup. C. R., iv. 272, Fournier, J.

matters which their lordships conceive might be competently dealt with by the parliament of the Dominion.[1]

Parliament may give powers to a railway or other company to expropriate and hold lands, as a necessary incident to its right to create such companies;[2] but it cannot lawfully prescribe the terms and conditions on which the conveyance of real estate is to be made to a corporate body, but should leave all laws in each province to operate as to such conveyance.[3] Nor does its authority to legislate for the regulation of trade and commerce comprehend the power to regulate by legislation the contracts of a particular business or trade, as such contracts are matters of civil rights which fall within the jurisdiction of the provincial legislatures.[4]

Parliament itself has, on more than one occasion, recognized the necessity of giving full scope to the powers of the provincial legislatures. For instance, it has refused to embody in an act such clauses as would practically nullify the provisions of a local statute, wholly within the jurisdiction of the local sovereignty, which had, in the first instance, created the corporation.[5]

On the other hand, the local legislatures, whose powers are limited compared with those of the general parliament, must be careful to confine the exercise of these to the particular subjects expressly placed under their jurisdiction, and not to encroach upon subjects which, being of national importance, are, for that very reason, placed under the exclusive control of parliament.[6]

No conflict of jurisdiction need arise because subjects which, in one aspect and for one purpose, fall within the powers of the Dominion legislature, may, in another aspect and for

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[1] Lord Watson, in the Proh. Liquor Laws Case, 19 L. N. 199.

[2] Can. Hans. (1882), 433 (Mr. Mills).

[3] Can. Com. J. (1883), 326.

[4] *Supra*, 87, 88.

[5] See Bourinot's Parl. Procedure, first chapter on private bills, sec. 3.

[6] Can. Sup. C. R , iv. 347, Gwynne, J.

another purpose, fall within the powers of the local legislatures. The general authority, for instance, possessed by the Dominion to make laws relating to public order and safety, or regulating trade and commerce, does not prevent the local legislature from exercising its municipal powers with respect to the same subjects.[1]

Laws designed for the promotion of public order, safety, or morals, belong to the subject of public wrongs rather than to that of civil rights. The primary matter dealt with by such legislation is the public order and safety—a matter clearly falling within the general authority of parliament to make laws for the order and good government of Canada.[2] Consequently a uniform law passed by the general legislature to promote temperance in the Dominion, does not conflict with the power possessed by the local legislature to pass an act authorizing the making of such police or municipal regulations of a merely local character as are necessary for the good government of taverns and other places licensed to sell liquor by retail.[3]

Where a power is specially granted to one legislature, that power will not be nullified by the fact that, indirectly, it affects a special power granted to the other legislature. "This is incontestable," says a learned judge, "as to the power granted to parliament (section 91, last paragraph), and probably is equally so as to the power granted to the local legislature. In other words, it is only in the case of absolute incompatibility that the special power granted to the local legislature gives way."[4] Such a principle seems absolutely necessary to the efficient operation of the federal constitution.

The Dominion parliament has no authority conferred upon it by the British North America Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by section 92. The repeal

[1] *Supra*, 96.

[2] *Ib.* 95, 96.

[3] *Supra*, 100, 101.

[4] Meredith, C. J., cited by Ramsay, J., 5 Leg. News, 333.

of a provincial act by the parliament of Canada can only be effected by repugnancy between the provisions and enactments of the Dominion; and if the existence of such repugnancy should become a matter of dispute, the controversy cannot be settled by the action either of the Dominion or the provincial legislature, but must be submitted to the judicial tribunals of the country.[1]

The right to direct the procedure in civil matters in the provincial courts has reference to the procedure in matters over which the provincial legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion parliament to direct the mode of procedure to be adopted in cases in which the Dominion parliament has jurisdiction and where it has exclusive authority to deal with the subject-matter, as it has with the subject of bankruptcy and insolvency.[2]

In the inception of the confederation it was believed by its authors that the care taken to define the respective powers of the several legislative bodies in the Dominion would prevent any troublesome or dangerous conflict of authority arising between the central and local governments.[3] The experience of the past twenty years has proved that it is inevitable in the case of every written constitution, especially in the operation of a federal system, that there should arise, sooner or later, perplexing questions of doubt as to where power exists with respect to certain matters of legislation. It has been sometimes urged in parliament that committees[4] should be organized in both houses to lay down rules or principles for legislation, in order to prevent, as far as possible, any conflict of jurisdiction. But it is questionable if political bodies can

[1] App C. (1896), 366.

[2] Ritchie, C. J., in Shields *v.* Peak, 8 S.C. R., 591. See also Lefroy, p. 440, *n.* 5.

[3] See remarks of Sir John Macdonald in 1865, Conf. Deb. 32.

[4] The Senate rules provide for the reference of bills on which the question of jurisdiction has been raised to the committee of standing orders and private bills.

ever be the safest interpreters of constitutional law. It is in the courts that the solution must be sought for the difficulties that arise in the working of a federal constitution. As long as the courts of Canada continue to be respected as impartial, judicious interpreters of the law, and her statesmen are influenced by a desire to accord to each legislative authority in the Dominion its legitimate share in legislation, dangerous complications can hardly arise to prevent the harmonious operation of a constitutional system whose basis rests on the principle of giving due strength to the central government, and at the same time every necessary freedom to the different provinces which compose the confederation.

**IV. Disallowance of Provincial Acts.**—The British North America Act not only enables the courts to decide legal controversies arising out of its provisions, but provides a more speedy mode of arresting the operation of provincial legislation clearly unconstitutional or injurious to the national interests. The same powers of disallowance that belonged to the imperial government previously to 1867, with respect to acts passed by colonial legislatures, have been conferred by the federal constitution on the government of the Dominion. It is now admitted beyond dispute that the power of confirming or disallowing provincial acts has been vested by law absolutely and exclusively in the governor-general-in-council.[1] In the first years of the confederation it became, therefore,

[1] "The power of the governor-general-in-council to disallow a provincial act is as absolute as the power of the king to disallow a Dominion act, and is, in each case, to be the result of the exercise of a sound discretion, and for which exercise of discretion the executive council for the time being is, in either case, to be responsible as for other acts of executive administration."—Harrison, C. J., in Leprohon *v.* City of Ottawa, 40 U. C. R. 490; Cart. i., 647. See also Can. Sess. P., 1877, No. 89, pp. 407, 432-34. In the Commons papers will be found the arguments advanced by Mr. Blake, when minister of justice, to show that the Canadian ministry must be directly and exclusively responsible to the Dominion parliament for the action taken by the governor in any and every such case, and that a governor who thinks it necessary that a provincial act should be disallowed, must find ministers who will take the responsibility of advising its disallowance. *Ib.* (1876), No. 116, pp. 79, 83. *Ib.* (1877), No. 89, pp. 449-458.

necessary to settle the course to be pursued in consequence of the large responsibilities devolved on the general government. As it was considered of importance "that the course of local legislation should be interfered with as little as possible, and the power of disallowance exercised with great caution, and only in cases where the law and general interests of the Dominion imperatively demanded it," the minister of justice in 1868 laid down certain principles of procedure, which have been generally followed up to the present time. On the receipt of the acts passed in any province, they are immediately referred to the minister of justice. He thereupon reports those acts which he considers free from objection of any kind, and if his report is approved by the governor-in-council, such approval is forthwith communicated to the provincial government. He also makes separate reports on those acts which he may consider:—

1. As being altogether illegal or unconstitutional.

2. As illegal or unconstitutional in part.

3. As, in cases of concurrent jurisdiction, clashing with the legislation of the general parliament.

4. As affecting the interests of the Dominion generally.

It has also been the practice, in the case of measures only partially defective, not to disallow the act in the first instance; but, if the general interest permits such a course, to give the local government an opportunity of considering the objections to such legislation and of remedying the defects therein.[1]

Provincial acts must be disallowed, when the occasion arises, in their entirety. The governor-general-in-council has no power to make a conditional disallowance; that is to say, to veto a part of an act and allow the remainder to become law. Neither can they suspend the operation of a statute so that the same may have no force or effect until it is assented to by a majority of the members of a legislature, constituted differ-

[1] Report of Sir J. A. Macdonald, Can. Sess. P., 1870, No. 35, pp. 6-7. Also, Hodgins, Compilation of Orders-in-Council (1886), vol. i., 5.

ently from that which was in existence at time of its passage.[1] Provincial statutes are not transmitted to the imperial government like federal statutes, and cannot be disallowed in England.[2]

Perhaps no power conferred upon the general government is regarded with greater jealousy and restlessness than this power of disallowing provincial enactments. So far, this power has been exercised in relatively few cases out of the large number of acts passed since confederation by the legislatures of the provinces. A review, however, of the very voluminous papers relating to this question proves that, whilst only a few acts have been disallowed, the legislation has been considered partially objectionable in many cases by the law officers of the Dominion; but, in such cases generally, every opportunity has been given to the local governments to remove the objections pointed out by the minister of justice.[3]

Considerable discussion has arisen, however, in and out of parliament, with respect to certain cases of disallowance. The first of these cases was in connection with "An act for protecting the public interests in rivers and streams" (Ontario Stat., 1881). It appears that one McLaren, a lumberman, constructed certain works on non-floatable streams, of which he claimed to be seized in fee-simple, for the purpose of carrying his logs to their destination. One Caldwell, carrying on the same business higher up than the former, claimed the right to use these streams under the first section of chapter 115, R. S. O., as follows: "All persons may, during the spring, summer and autumn freshets, float saw-logs, and other lumber, rafts and craft down all streams." McLaren obtained an injunction from the court of chancery, restraining Caldwell from making use of the improvements in question, on the ground

[1] See Hodgins' Prov. Leg., vol. I., pp. 674-5; Lefroy, 197.

[2] Taschereau, J., in Lenoir *v.* Ritchie, 3 Can. Sup. C. R., 624. Cart. i., 531. See also Todd's Parl. Gov. in B. C., 2nd ed., p. 462, where the opinion of Lord Carnarvon, secretary of state for the colonies, is cited. Also Lefroy, p. 202, especially *n.* 2.

[3] Can. Sess. P., 1882, No. 141, pp. 2-29; *Ib.* 1886, No. 81.

that the words "all streams" only referred to those floatable in a state of nature, and that the streams in question were not navigable for saw-logs or other lumber without artificial improvements.[1] Subsequently, in 1881, the legislature of Ontario passed an act re-enacting the section cited above, and at the same time declaring that its provisions shall extend to all streams and all constructions and improvements thereon; and that all persons might make use of such improvements on paying a reasonable toll (to be fixed by the lieutenant-governor-in-council) to the person who has made these improvements on the streams. An appeal was made to the governor-general-in-council to disallow the act on the ground that it was unconstitutional, inasmuch as it deprived the petitioner of extensive and important private rights without providing adequate compensation, and as it embodied *ex post facto* legislation, contrary to all sound principles that should govern in such cases. The minister of justice advised, and the privy council concurred in the advice, that the act be disallowed for these reasons principally: "That the act seems to take away the use of the owner's property and give it to another, forcing the owner practically to become a toll-keeper against his will, if he wished to get any compensation for being thus deprived of his rights. That the power of the local legislatures to take away the rights of one man and vest them in another, as is done in the act, is exceedingly doubtful; that, assuming such a right does in strictness exist, it devolves upon the Dominion government to see that such power is not exercised in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the act over-rides a decision of a court of competent jurisdiction by declaring retrospectively that

[1] The supreme court of Canada, in November, 1882, affirmed the decree of the court of chancery, and reversed the decision of the court of appeal of Ontario to the effect that the R. S. O., c. 115, s. 1, re-enacting C. S. U. C., c. 48, s. 15, made all streams, whether artificially or naturally floatable, public waterways. Can. Sup. C. R., viii. 435. In 1884 the privy council decided that the judgment of the supreme court should be reversed and that of the court of appeal restored. L. N. 195, 203.

the law always was, and is, different from that laid down by the court." To this decision strong objection was taken by the government of Ontario, in an elaborate state-paper, in which it was emphatically urged that the governor-general-in-council should not assume to review any of the provisions of an act passed by the provincial legislature on a subject within its competency under the British North America Act.[1] The legislature of Ontario subsequently re-enacted the act of 1881, which was again disallowed by the government of the Dominion.

The act of the Manitoba legislature, incorporating the Winnipeg South-Eastern Railway Company, was disallowed because it conflicted with "the settled policy of the Dominion, as evidenced by a clause in the contract with the Canadian Pacific Railway," which was ratified by parliament in the session of 1880-81; which clause is to the effect that "for twenty years from the date hereof no line of railway shall be authorized by the Dominion parliament to be constructed south of the Canadian Pacific Railway, from any point at or near the Canadian Pacific Railway, except such line as shall run south-west or to the westward of south-west, nor to within fifteen miles of latitude 49." The government of Manitoba contended at the time that the act was "strictly within the jurisdiction of the legislature of the province."[2] The government of Canada subsequently disallowed the acts of Manitoba to incorporate the Manitoba Tramway Co., to incorporate the Emerson and North-Western R. R. Co., and to encourage the building of railways in Manitoba, on the ground also, that they were "in conflict with the settled policy of the Dominion government in regard to the direction and limits of railway construction in the territories of the Dominion." To this policy the government of the Dominion strictly adhered for years. In 1886 they disallowed the charters granted to the Manitoba Central Railway Company, and to the Rock Lake, Souris Valley & Brandon R. R. Co., and in 1887 those to the Winnipeg

[1] Can. Sess. P., 1882, No. 149a. Hans., 876-926.

[2] Can. Sess. P., 1882, No. 166.

and Southern Railway Company and the Red River Valley R.R.[1] In 1883 the acts passed by the legislature of British Columbia "to incorporate the Fraser River Railway Company," and "to incorporate the New Westminster Southern Railway Company," were disallowed for the same reasons.[2]

Much irritation was felt in Manitoba on account of this policy, and the difficulty at last assumed a serious aspect when the government of the province persisted in an attitude of resistance to the power of disallowance exercised under these circumstances by the Dominion government. Finally in order to settle a grave difficulty, the Dominion government came to an arrangement with the Canadian Pacific Railway Company, under which they relinquished for certain considerations the exclusive privilege contained in their original contract as stated above.[3]

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[1] Can. Sess. P. 1886, No. 81; Can. Gazette, 1887.

[2] Hodgins, i., 819, 820.

[3] See 51 Vict., c. 32, "An act respecting a certain agreement between the government of Canada and the Canadian Pacific Railway Company." Also speech of Sir Charles Tupper, minister of finance, Can. Hans. (1888), 1332. This settled the dispute as far as the power of disallowance in this case was concerned, but subsequently the matter in another form came before the supreme court of Canada in accordance with the sections of the Canada Railway Act, 51 Vict., c. 29, providing for a reference to the court for its opinion upon any question which, in the opinion of the railway committee of the Canadian privy council, is a question of law. Under chap. 5 of the statutes of Manitoba, passed in 1888, the railway commissioner of that province commenced the construction of the Portage extension of the Red River Valley Railway (within the province), and it was found necessary to make application to the railway committee of the privy council of Canada (under sec. 173 of the Railway Act of 1888) for the approval of the place at which, and the mode by which the extension in question should cross the Pembina Mountain branch of the Canadian Pacific Railway Co. Thereupon the latter company intervened and raised a preliminary legal objection that the railway commissioner of Manitoba had no authority to construct a line crossing the Canadian Pacific Railway in consequence of the illegality of the statute. Mr. Edward Blake argued on behalf of the company before the supreme court that the parliament of Canada had, years ago (see 46 Vict., c. 24, s. 6, and Rev. Stat., c. 109, s. 121) efficiently exercised its declaratory and sovereign power (see B. N. A. Act, 1867, s. 92, subs. 10 c.) with reference to railway works by the declaration that a work crossing the Canadian Pacific

These cases show the large power assumed by the Dominion government under the law giving it the right of disallowing provincial enactments. The best authorities concur in the wisdom of interfering with provincial legislation only in cases where there is a clear invasion of Dominion jurisdiction, or where the vital interests of Canada as a whole imperatively call for such interference. The powers and responsibilities of the general government in this matter have been well set forth by judicial authorities: "There is no doubt of the prerogative right of the Crown to veto any provincial act, and to apply it even to a law over which the provincial legislature has complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the federal government to substitute its opinion instead of that of the legislative assemblies in regard to matters within their jurisdiction, without exposing itself to be reproached with threatening the independence of the provinces." The injurious consequences that may result in case a province re-enacts a law, are manifest: "probably grave complications would follow." And in any case, "under our system of government, the disallowing of statutes passed by a local legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the

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Railway is a work for the general advantage; that by that declaration any such work has been removed from the provincial and assumed to be within the Dominion cognizance; that this work before the court was specifically such a work and therefore no other conclusion could be reached than that the provincial legislature was utterly incompetent to authorize the construction of such a work. The question submitted by the railway committee for the supreme court of Canada (see sec. 19 of the R. R. Act of 1888) was to the effect, whether the Manitoba statute in view of the provisions of c. 109 Rev. Stat. of Canada, particularly sec. 121, and of the R. R. Act of 1888, particularly ss. 306 and 307, was valid and effectual so as to confer authority on the railway commissioner to construct the railway in question. The supreme court unanimously declared its opinion that the Manitoba act is valid, and the railway constructed under it entitled to cross the C. P. R. subject to the approval of the railway committee, as provided by the Railway Act. See report of argument before the supreme court on this question, Ottawa, 1888. Legal News (1889), vol. xii., 4, 5.

British North America Act, will always be considered a harsh exercise of authority, unless in cases of great and manifest necessity, or where the act is so clearly beyond the powers of the local legislature that the propriety of interfering would at once be recognized."[1]

**V. Position of the Judiciary.**—Before closing this review of the constitution of Canada, it is necessary to refer briefly to the position of the judiciary, which occupies a peculiarly important status in a country possessing a written constitution which must necessarily require to be interpreted from time to time by accepted authorities.[2]

The administration of justice in the provinces, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts, forms a class of

[1] Can. Sup. C. R., ii., Richards, C. J., 96; Fournier, J., 131. The principles laid down in the remarks of the learned judges, cited above, were emphatically urged in the House of Commons in the debate of 1889 on the act passed by the legislature of Quebec respecting the settlement of the Jesuits' estates, which, some contended, ought to have been disallowed as beyond the power of the legislature, for reasons set forth in a resolution which was negatived by 188 to 13. The Dominion government had previously advised the governor-general that the act dealt with a fiscal matter within the exclusive jurisdiction of the Quebec legislature, and that accordingly it should be left to its operation. Can. Hans. (1889), 811-910; Todd's Parl. Gov. in B. C., 2nd ed., 484. It is now generally admitted that it is advisable to leave the courts, whenever practicable, to deal with all questions involving matters of constitutional controversy, and to reserve the power of disallowance for unconstitutional legislation—on which there is no doubt—or for cases involving the peace, unity or national obligations of the confederation.

[2] The supreme court of the United States is considered in the Federalist, and the history of the American constitution proves the truth of the words, "a bulwark of a limited constitution against legislative encroachments." The meaning of the word "limited" is explained by Alexander Hamilton: "By a limited constitution, I understand one which contains certain specified exceptions to legislative authority, such, for instance, as that it shall pass no bill of attainder, no *ex post facto* law, and the like limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void; without this, all the reservation of particular rights and privileges would amount to nothing." Federalist, lxxviii.

subjects placed by the fundamental law[1] within the exclusive control of the provincial legislatures. In the province of Quebec the French law derived from the *Coutume de Paris*, has come down from the days of the French régime, and prevails in all civil matters, and the civil laws of that territorial division, including those of procedure, have been duly codified as the "Civil Code of Lower Canada."[2]

In the other provinces, the sources of law are the common law of England, brought naturally into the country by the English settlers, and the statutory laws passed from time to time by the legislative authorities. The criminal law is uniform throughout the Dominion, and is under the jurisdiction of the parliament of Canada, except so far as relates to the constitution of the courts.[3] The governor-general-in-council appoints the judges of the superior, district and county courts throughout the Dominion, except those of the courts of probate in Nova Scotia and New Brunswick.[4] The judges in Ontario, Quebec, Nova Scotia, New Brunswick and Prince Edward Island[5] continue to be selected from the bars of their respective provinces.

The independence of the judiciary has been for very many years recognized in Canada, as one of the fundamental principles necessary to the conservation of public liberty. The judges are not dependent on the mere will of the executive in any essential respect, nor on the caprice of the people of a

[1] B. N. A. Act, 1867, sub-s. 14, s. 92.

[2] See 29 Vict., c. 41, "An Act respecting the Civil Code of Lower Canada." (Sup. vol. to Rev. Stat. of Canada, 1886.) Also Sharp's Civil Code of L. C., in 2 vols., 1889.

[3] B. N. A. Act, 1867, sub-s. 27, s. 91.

[4] *Ib.* 96, justices of the peace, police and stipendiary magistrates are appointed in each province by the lieutenant-governor-in-council.

[5] *Ib.* 97. "Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure of the courts in those provinces are made uniform, the judges of the courts of those provinces appointed by the governor-general shall be selected from the respective bars of those provinces." 98. "The judges of the courts of Quebec shall be selected from the bar of that province."

province, for their nomination and retention in office, as in many of the states of the American republic. Their tenure is as assured in Canada as in England, and their salaries are not voted annually, but are charged permanently on the civil list. In case it is necessary to provide a salary, or increase of salary, for a judge, the proper course is for the government to proceed by bill.[1] The judges of the superior courts hold office during good behaviour, and can only be removed by the governor-general on address of the Senate and House of Commons.[2] In impeaching a judge for misconduct in office, the House of Commons discharges one of the most delicate functions entrusted to it by law. In such a matter it cannot proceed with too great caution and deliberation. Whenever charges of a serious character have been brought against a judge, and responsible persons have declared themselves prepared to support such charges, it has been the practice to appoint a select committee, to whom all the papers can be referred for a thorough investigation. Since 1867 only two committees of this character have been formally appointed, but in neither case did the inquiry result in the least degree to the discredit of the judge whose character was impugned.[3] It is usual to have all the documents in the case printed in the first instance without delay, so that the House and the persons immediately

[1] See 31 Vict., c. 33. Rev. Stat. of Can., c. 138. B. N. A. Act, 1867, s. 100. For short account of the constitution of the courts of Canada, see Bourinot's "How Canada is Governed," pp. 128, 170.

[2] B. N. A. Act, 1867, s. 99. This section does not apply to county court judges, whose removal for sufficient cause is provided for by 45 Vict., c. 12 (Rev. Stat., c. 138, s. 2). It is, however, under British practice, competent for the House to address the governor-general for the removal of such judicial officers, and the procedure in parliament should be as in the case of the superior court judges. See case of W. McDermott, asst. barrister of Kerry, 150 E. Hans. (3), 1587, 1588; 90 Lords J., 221, 237, 239, 244, 251, 261. Also Mr. Kenrick's case, 13 Parl. Deb. N. S., 1138, 1425, 1433; 14 *Ib.*, 500-502, 511, 670-678. Also remarks of Sir J. A. Macdonald and Mr. Blake, April 9, 1883, in the Bothwell case, Can. Hans.

[3] Case of Judge Lafontaine, Can. Com. J. (1867-8), 297, 344, 398; *Ib.* (1869), 135, 247. Of Judge Loranger, *Ib.* (1877), 20, 25, 36, 132, 141, 258. A committee was asked for in 1882 in the case of Chief Justice Wood, of Manitoba, but never appointed.

interested may have due cognizance of the nature of the charges against the judge.[1] Copies of the charges should be communicated as soon as possible to the judge in question, when they are stated in a petition or made by a member in his place.[2] Witnesses should be examined on oath in all such cases.[3] All the weight of authority in Canada, as in England, goes to show that the House should only entertain charges, which if proved, would justify the removal of the judge from the bench. It will be for the House, and especially for those responsible for the administration of justice, to consider whether the allegations are of such a nature, and supported by such authority, as demand an investigation at their hands.[4] The proper and most convenient course is for the persons who feel called upon to attack the character of a judge to proceed by petition, in which all the allegations are specifically stated, so that the judge may have full opportunity of answering the indictment thus presented against him.[5] But the action of parliament may originate in other ways, if the public interest demand it, and there is no objection to a member formulating charges on his own responsibility as a member of the legislature having a grave duty to discharge.[6] No petition impugning

[1] Can. Com. J. (1867-8), 400; *Ib.* (1877), 25, 132; *Ib.* (1882), 192. Todd. Parl. Govt. in England, ii., 876.

[2] Mr. Justice Kenrick's case, E. Com. J., vol. 80, pp. 582, 607; Todd, ii., 865.

[3] Can. Com. J. (1877), 36. At the time of the previous case, select committees had no power to administer oaths to witnesses. Such power was given to the Houses in 1876.

[4] See memorable cases of Baron Abinger and Sir Fitzroy Kelly, cited by Todd, ii. 870, 871. In 1883 the Canadian House refused a motion to inquire into the conduct of a judge in the discharge of his duties in connection with a matter *sub judice*. See remarks of Sir J. A. Macdonald in Bothwell election case, April 9, Can. Hans. In 1885, a senator who presented a petition in the senate asking for an investigation into certain charges against a judge, withdrew it on a statement from the minister of justice that there was nothing in the charges alleged. Sen. Deb. (1885), 108.

[5] Sir J. A. Macdonald, April 9, 1883, Can. Hans., Bothwell case. Cases of Judge Fox and Judge Kenrick, cited in Todd, ii., 862, 865.

[6] Case of Baron McLeland, 74 E. Com. J., 493; 11 Parl. Deb., 850-854; Kenrick's Case, 80 E. Com. J., 607.

the conduct of a judge should be permitted to lie on the table, unless it is taken up within a reasonable time and proceeded with regularly.[1] The constitutional usage of the parent state also requires that in any address asking for the removal of a judge, "the acts of misconduct which have occasioned the adoption thereof ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament." In cases where this very proper rule has not been followed, the Crown has refused to give effect to the address, though passed by a colony enjoying responsible government, because "in dismissing a judge, in compliance with addresses from a local legislature and in conformity with law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility, which her majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper."[2]

[1] Todd, ii., 873.

[2] Todd, ii., 904. Corresp. relative to Judge Boothby, English Com. P., 1862, vol. xxxvii., 180-184.

# CHAPTER III.

## *GENERAL OBSERVATIONS ON THE PRACTICAL OPERATION OF PARLIAMENTARY GOVERNMENT IN CANADA.*

I. Prefatory, p. 154.—II. Constitutional Relations between Great Britain and Canada, p. 155.—III. The Written and Unwritten Law of the Constitution, p. 159.—IV. Constitution of the Executive Government of the Dominion, p. 162.—V. Formation of a Ministry, p. 165.—VI. Responsibility of Ministers for Administration and Legislation, p. 171.—VII. Orders-in-Council, p. 181.—VIII. Procedure on Resignation of Ministers, p. 183.—IX. The Law and Usage of Parliament, p. 186. Conclusion, p. 188.

**I. Prefatory.**—In the first chapter of this book the author has endeavoured to give a concise sketch of the various phases of the constitutional development of the provinces of British North America, from the time Canada became a possession of England and exchanged the absolutism and centralization of the French régime for the representative institutions of England. The liberal system of local self-government which Canada now enjoys, as a portion of the British Empire, is the result of the struggles of the statesmen and people of Canada since the close of the last century, when all the provinces were given the right to hold representative assemblies. For more than half a century after the concession of representative institutions, the political expansion of the provinces was more or less retarded by the absence of the great governing principle of the English system, which has developed itself slowly since the revolution of 1688—that great principle which makes the ministry or government of the day responsible both to the sovereign and the legislature for all matters of administration and legislation, and allows it to continue in office only while it retains the approval of the people's house. From 1840 to 1866, however, this guiding principle of parliamentary institutions was acknowledged in the largest sense by the imperial government and obtained its fullest expression

in the passage of the measure providing for the federation of the provinces, which has enabled the different communities, known under the political title of the "Dominion of Canada," to assume many of the functions of an independent nationality, and extend their legislative and administrative authority over a region of vast territorial extent.[1]

**II. Constitutional Relations between Great Britain and Canada.**— But while Canada has been able, through the efforts of her statesmen and people, to attain so large a measure of legislative independence in all matters of internal concern, there still exist between her and the parent state those legal and constitutional relations which are compatible with the respective positions of the sovereign authority of the empire, and of a dependency. At the head of the executive power of the Dominion is the king of England, guided and advised by a privy council, whose history is co-existent with that of the regal authority itself. Through this privy council, of which the cabinet is a committee, the sovereign exercises that control over Canada and every other colonial dependency, which is necessary for the preservation of the unity of the Empire and the observance of the obligations that rest upon it as a whole. Every act of the parliament of Canada is subject to the review of the king in council, and may be carried from the Canadian courts under certain legal limitations to the judicial committee of the privy council, one of the committees which still represent the judicial powers of the ancient privy council of England. The parliament of Great Britain—a sovereign body limited by none of the constitutional or legal checks which restrict the legislative power of the United States congress—can still, and does actually, legislate from time to time for Canada and the other colonies of the Empire. From a purely legal standpoint, the legislative authority of this great assembly has no limitation and might be carried so far as not merely to restrain any of the legal powers of the Dominion as set forth in the charter of its constitutional action, known as the British North America

[1] See Bourinot's Canada under British Rule, cc. vi , vii.

Act of 1867, but even to repeal the provisions of that imperial statute in whole or in part.

But while the sovereign of Great Britain, acting with the advice of the privy council and of the great legislative council of the realm, is legally the paramount authority in Canada as in all other portions of the Empire, his prerogatives are practically restrained within certain well understood limits, so far as concerns those countries to which have been extended legislative institutions and a very liberal system of local self-government.[1] In any review of the legislative acts of the Dominion, the government of England has for many years past fully recognized those principles of self-government which form the basis of the political freedom of Canada. No act of the parliament of the Dominion can now be disallowed except it is in direct conflict with imperial treaties to which the pledge of England has been solemnly given, or with a statute of the imperial legislature which applies directly to the dependency. The imperial parliament may legislate in matters immediately affecting Canada,[2] but it is understood that it only does so as a rule in response to addresses of her people through their own parliament, in order to give validity to the acts of the latter in cases where the British North America Act of 1867 is silent, or has to be supplemented by additional imperial legislation.

That act itself was not a voluntary effort of imperial authority, but owes its origin to the solemn expression of the desire of the several legislatures of the provinces, as shown by addresses to the Crown, asking for an extension of their political privileges.[3] Within the defined territorial limits of

[1] "It is therefore a fundamental maxim of parliamentary law that it is unconstitutional for the imperial parliament to legislate for the domestic affairs of a colony which has a legislature of its own."—Hearn, Government of England, 598, appendix, Art. on "The Colonies and the Mother Country."

[2] "The general rule is that no act of the imperial parliament binds the colonies unless an intention so to bind them appears either by express words or by necessary implication."—Hearn, 596.

[3] See argument of Hon. Edward Blake before the judicial committee in case of St. Catharines Milling and Lumber Co. *v.* The Queen, published in pamphlet form at Toronto in 1888.

those powers which have been granted by the imperial parliament to the Dominion and the provinces, each legislative authority can exercise powers as plenary and ample as those of the imperial parliament itself acting within the sphere of its extended legislative authority.[1] Between the parent state and its Canadian dependency there is even now a loose system of federation under which each governmental authority exercises certain administrative and legislative functions within its own constitutional limits, while the central authority controls all the members of the federation so as to give that measure of unity and strength without which the Empire could not keep together. Each government acts within the limits of its defined legislative authority with respect to those matters which are of purely local concern, and it is only when the interests of the Empire are in direct antagonism with the privileges extended to the colonial dependency, the sovereign authority should provail. This sovereign authority can never be exercised arbitrarily, but should be the result of discussion and deliberation, so that the interests of the parent state and the dependency may be brought as far as possible into harmony with one another. The written and unwritten law provides methods for agreement or compromise between the authorities of the parent state and its dependencies. In matters of law the privy council is guided by various rules which

[1] See Hodge *v.* The Queen, *supra*, 101. With respect to the subjects over which the parliament and legislatures of Canada have legislative control by the British North America Act of 1867, "they must be considered to have the plenary powers of the imperial government [to quote the words of the judicial committee], subject only to such control as the imperial government may exercise from time to time, and subject only to her Majesty's right of disallowance, which the B. N. A. Act reserves to her and which no one doubts will be exercised with full regard to constitutional principles and in the best interests of the country, when exercised at all." See correspondence on Copyright Act (Rev. Stat. of Canada, c. 62), Can. Sess. P. 1890, No. 35, p. 10. For respective powers of Imperial and Canadian Governments, see report of committee of privy council of Canada relating to appeals in criminal cases to the judicial committee of the privy council of England, Can. Sess. P. 1889, No. 77. Bourinot's Fed. Gov. in Canada, Johns Hopkins U. S., 38-44. Also speech of Sir John Thompson, minister of justice, Can. Hans., 1889. March 27. And copyright debate, 1891, Sept. 4.

wisely restrict appeals from the dependency within certain definite limits. In matters of legislation and administration, on which there may be a variance of opinion between the Canadian and the English government, the means of communication is the governor-general and the secretary of state for the colonies. The former as an imperial officer responsible to the Crown for the performance of his high functions, as the representative of the sovereign in the dependency, will lay before the imperial government the opinions and suggestions of his advisers on every question which affects the interests of Canada, and requires much deliberation in order to arrive at a fair and satisfactory adjustment.[1]

It may be contended that there is no absolute written law to govern these relations—to restrain the imperial government in its consideration of Canadian questions—to give a positive legal independence to the Canadian government in any respect whatever; but in answer to this purely arbitrary contention it may be argued with obvious truth that, when the imperial parliament gave the Canadians a complete system of local government and the right to legislate on certain subjects set forth in the fundamental law of the dependency (the British North America Act), it gave them full jurisdiction over all such matters, and constitutionally withdrew from all direct interference in the local concerns of the colony. More than that, in addition to the obvious intent and purpose of the written constitution of the Dominion, there are certain conventions and understandings which appear in the instructions laid down by the imperial authorities themselves from time to time for the self-government of these colonial communities since the concession of responsible government—conventions and understandings which have as much force as any written statute, and which practically control the relations between England and Canada so as to give the latter the unrestricted direction of every local matter, and the right of legislating on

[1] "The matter is fought out between the colonial government and the colonial office," Hearn, 602. See correspondence on copyrights and appeals in criminal cases, *supra*, 157, *n.*

every question sanctioned by the terms of the constitutional law.

The British North America Act of 1867, then, is a charter of constitutional freedom, recognizing in a practically unrestricted sense the right of Canada to govern herself, subject only to the general control of the sovereign authority of the Empire. This act establishes a federal system which gives control over Dominion objects to the central executive and legislative authority, and permits the governments of the provinces to exercise certain defined municipal and local powers within provincial limits, compatible with the existence of the wide national authority entrusted to the federal government. Within its local statutory sphere each provincial entity can exercise powers as plenary and absolute as the Dominion itself within the wide area of its legislative jurisdiction. For the settlement of questions of doubtful jurisdiction the constitution provides a remedy in a reference to the courts, on whose decision must always largely rest the security of a federal system,[1] and to a minor degree in the power possessed by the Dominion government of disallowing provincial acts—a power, however, as it is shown elsewhere, only to be exercised in cases of grave emergency or of positive conflict with the law and the constitution.[2]

**III. The Written and Unwritten Law of the Constitution.**—If we study the constitution of Canada we find that its principles rest both on the written and the unwritten law. In the British North America Act we have the written law, which must direct and limit the legislative functions of the parliament and the legislatures of the Dominion. While this act provides for executive authority and for a division of legislative powers between the Dominion and the provinces —as we have seen in the first chapter of this work—it does not attempt to give legal effect or definition to the flexible system of precedents, conventions and understandings which

[1] See Dicey's Law of the Constitution, 3rd ed., 163-168.

[2] See Bourinot's Fed. Gov. in Canada, 58-65. Also, *supra*, 148.

so largely direct that system of administration and government which has grown up in the course of two centuries in England, and which has been gradually introduced into Canada during the past fifty years, and now forms the guiding principles of parliamentary government in the two countries.[1]

No doubt, strictly speaking, these conventions are not law in a technical sense, and a distinction must be drawn between the law of the constitution, that is, the British North America Act, and the understandings of the constitution. If these are of force, it is mainly because they have in the course of time received the sanction of custom—of an understanding on the part of the people that they are necessary to the satisfactory operation of parliamentary government and to the security of the political privileges which Canada now possesses as a self-governing country. If a court were called upon to-morrow to consider the legality of an act of the Dominion parliament, granting large sums of public money for certain public purposes, on the ground that it had not received the recommendation of the Crown at its initiation, in pursuance of a provision of the fundamental law, the judge could properly take cognizance of the objection and adjudicate thereon. If parliament were to exercise its legislative authority beyond the legal term of five years to which it is limited in express terms, its acts after the expiration of its legal existence might be called into question in the courts of Canada. On the other hand, if a ministry should refuse to resign when it is clearly shown that it has no majority in the popular body of the legislature, and can no longer direct and control the legislation of the country, the courts could not be called upon to take

[1] With reference to these conventions and understandings, see Freeman's Growth of the English Constitution; Dicey's Law of the Constitution, 3rd ed.; Bourinot's Fed. Gov. in Canada. Prof. Dicey, in his excellent exposition of this subject, says (p. 24) that constitutional law "consists of two elements. The one element, which I have called 'the law of the constitution,' is a body of undoubted law; the other element—which I have called 'the conventions of the constitution,' consists of maxims or practices, which, though they regulate the ordinary conduct of the Crown and ministers and of others under the constitution, are not, in strictness, laws at all."

cognizance of the fact by any legal act of theirs, however excited public opinion might be on account of so flagrant a violation of generally admitted conventions of the constitution. Parliament, however, in the practical operation of the constitution, would have a remedy in its own hands—it could refuse supply to the ministry, which would eventually find itself unable to meet public expenditures except in the few instances where there would be statutory authority for permanent grants. The courts might be called upon, soon or late, to stop the levy of illegal taxes or otherwise refuse legal sanction to certain acts arising from a violation of those rules and maxims which govern the operation of parliamentary institutions.[1] But it would be only under such extraordinary circumstances—circumstances practically of a revolutionary character—that the courts could be called upon to interpose in the working of the constitution. It is mainly in the good sense and the political instincts of the people at large that these conventions find that sanction which gives them a force akin to that given to the principles of the common law. A ministry that violates these rules and conventions, which have been long approved by the test of experience as necessary for good and effective government, must soon or late find itself subject to the verdict of the people under the written law which dissolves parliament every five years, and gives the legally qualified electors an opportunity of condemning or approving the acts of the men who have controlled the work of administration and legislation in the country. The strength of the Canadian system of government is the fact that it not

[1] See Dicey, c. xv., on the conventions of the constitution, in which he shows that "the breach of a purely conventional rule, of a maxim utterly unknown, and indeed opposed to the theory of English law, ultimately entails upon those who break it direct conflict with the undoubted law of the land. We have therefore a right to assert that the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not law, but in so far as they really possess binding force they derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker."

only rests on the written law of the constitution, but possesses that flexibility which accompanies conventions and understandings.

**IV. Constitution of the Executive Government of the Dominion.**— In arranging the details of the federal system of Canada, the framers of the British North America Act had before them the experience of that remarkable instrument of federal government — the constitution of the United States,— and endeavoured to perfect their own system by avoiding what they considered to be inherent defects in the institutions of their neighbours.[1] But while of necessity they were forced to turn to the political system of the United States for guidance in the construction of a federal system, they adhered steadily to those principles which give strength to that system of English parliamentary government, and which their own experience for forty years had shown them to be best adapted to the conditions of the confederation. But while the resolutions of the Quebec conference gave expression emphatically to the desire of the Canadian people "to follow the model of the British constitution so far as our circumstances will permit," the written law or British North America Act sets forth only in general terms in its enacting clauses the constitution of the executive authority and of the legislative bodies, where are reproduced essential features of the English system. While in the character of the executive and in the bicameral form of the general legislature we see an imitation of English institutions,[2] we detect actually a tendency to depart from the English model in the provinces where the upper chamber in several instances has already been abolished.[3] In this respect the Dominion is less English than the United States, where the congress of the federal union and all

[1] *Supra,* 80, 81.

[2] "The true merit of the bicameral system is that by dividing a power that would otherwise have been beyond control it secures an essential guarantee for freedom."—Hearn, 553. See Guizot, History of Representative Government, 443; Mill, Representative Government, 233.

[3] See *supra,* 79.

the state legislatures have rigidly adhered to two houses. When we come to consider the constitution of the executive authority in the Dominion and in the provinces we see that conventions and understandings mainly govern the methods of government throughout Canada. Nowhere do we find formally set forth in the fundamental law of Canada the rules and maxims which govern the cabinet or ministry or government, as the advisers of the governor-general or of the lieutenant-governors are indifferently called in accordance with the custom which Canadians have of reproducing old English phrases. We find simply stated in the British North America Act that there shall be a council "to aid and advise the government of Canada," and the persons who form that council are "chosen and summoned by the governor-general and sworn in as privy councillors and members thereof." An executive council or ministry in Quebec and Ontario is composed of "such persons as the lieutenant-governor from time to time thinks fit." The constitution of the executive authority in the provinces of Nova Scotia and New Brunswick "continues as it existed at the time of the union until altered under the authority of this act."[1]

When the other provinces were added to the union, their executive authority was defined in equally general terms.[2] Nothing is said of the principles by which ministers come into, retain and retire from office. All those principles can be found only in the despatches of secretaries of state, in the speeches of leading statesmen in England and Canada—especially of those in the former country who have done so much to mould the system in the past—in the rules and usages which have generally received public sanction as essential to the satisfactory operation of responsible government. At present this system of government exists in all its force in the Dominion, and in the provinces as well.

[1] B. N. A. Act, 1867, ss. 11, 12, 13, 64, 65, 66. See *supra*, chapter i., ss. 7 and 9.

[2] *Supra*, 71 (P. E. Island); 71 (Manitoba); 72 (British Columbia).

Canada consequently presents the first instance of a federation of provinces working out in harmony with a written system of federal law that great code of charters, usages and understandings known as the English constitution. In the Dominion, however, the only advisory body known to the constitutional law is "the Queen's privy council for Canada," which has its origin in the desire of the Canadian people to adapt as far as possible to their own circumstances the ancient institutions of the parent state.[1] But all privy councillors in Canada are not the advisers of the governor-general for the time being. At the present time there are in Canada fifty-seven gentlemen called privy councillors,[2] but of these only a small proportion, from twelve to sixteen, form the actual government of Canada. Following English precedent, the governor-general has also conferred the distinction of privy councillor upon several distinguished gentlemen who have been speakers of the Senate and House of Commons. It may be argued that the fact that these gentlemen have been sworn to the privy council gives them a certain limited right to be consulted by the representative of the sovereign in cases of a political emergency or a national crisis, but this is a privilege only to be exercised under very exceptional circumstances while Canada enjoys responsible government.[3] For instance,

[1] See *supra*, 52. In Ireland there is also a privy council. In the federal constitution of the commonwealth of Australia, the central authority is called an executive council. In the early constitution of the state of Delaware, the executive council associated with the governor was called a privy council, but the name has long since disappeared. Bryce, The American Commonwealth, ii., 103, 104. The title exists still in the little colonies of Bermuda and Jamaica, where there is no responsible government. See Col. Office List for 1901.

[2] See Col. Office List. (1900), 36.

[3] "The king, moreover, is at liberty to summon whom he will to his privy council; and every privy councillor has in the eye of the law to confer with the sovereign upon matters of public policy. The position and privileges of cabinet ministers are in fact derived from their being sworn members of the privy council. It is true that by the usages of the constitution cabinet ministers are alone empowered to advise upon affairs of state, and that they alone are ordinarily held responsible to their sovereign and to parliament for the government of the country. Yet it is quite conceivable that circumstances

on the resignation or dissolution of a ministry the Crown has a right to consult any privy councillor with respect to the formation of a new administration. As a rule of strict constitutional practice, the sovereign should be guided only by the advice of men immediately responsible to parliament and to the Crown for the advice they tender. The members of the cabinet or ministry which advises the governor-general must be sworn of the privy council, and then called upon to hold certain departmental offices of state.[1] They are a committee of the privy council, chosen by the governor-general to conduct the administration of public affairs. They are strictly a political committee, since it is necessary that they should be members of the legislature.

**V. Formation of a Ministry.**—The political head of this cabinet or ministry is known as the prime minister or premier—a title totally unknown to the written law, and only recognized by the conventions of the constitution.[2] It is he who is first called upon by the governor-general to form the advisory body known as the ministry. His death, dismissal or resignation dissolves *ipso facto* the ministry,[3] and it is necessary that the representative of the sovereign should choose another public man to fill his place and form a new administration. The premier is essentially the choice of the governor-general—a choice described by a great English statesman as "the personal act of the sovereign," since it is for her alone "to determine in whom her confidence shall be placed."[4] A retiring premier may, in his capacity of privy councillor, suggest some statesman to take his place, but such advice cannot be given unsolicited, but only at the request of the Crown itself.[5] But this

might arise which would render it expedient for the king, in the interests of the constitution itself, to seek for aid and counsel apart from his cabinet." —Todd, i., 116. Also *Ib.* 334.

[1] See *supra*, chapter i., s. 7.

[2] Hearn's Government of England, 223. See Gladstone's Gleanings, i., 244.

[3] Gladstone's Gleanings, i., 243.

[4] Sir Robert Peel, 83 Eng. Hans. (3), 1004. Also Lord Derby, 123 *Ib.* 1701; Disraeli, 214 *Ib.* 1943.

[5] Todd, i., 116, 328.

personal choice of the representative of the sovereign has its limitations, since the governor-general must be guided by existing political conditions. He must choose a man who is able to form a ministry likely to possess the confidence of parliament. If a ministry be defeated in parliament, it would be his duty to call upon the most prominent member of the party which has beaten the administration to form a new government. It is quite competent for the governor-general to consult with some influential member of the dominant political party, or with a privy councillor,[1] with the object of eventually making such a choice of a prime minister as will ensure what the Crown must always keep in view—a strong and durable administration capable of carrying on the Queen's government with efficiency and a due regard to those principles which the sovereign's representative thinks absolutely essential to the interests of the dependency and the integrity of the Empire. Once the statesman called upon by the Crown has accepted the responsibility of premier, it is for him to select the members of his cabinet and submit their names to the governor-general. The premier, in short, is the choice of the governor-general; the members of the cabinet are practically the choice of the prime minister.[2] The governor-general may constitutionally intimate his desire that one or

[1] It is not essential that the person selected to bring about the construction of a new cabinet should be the intended prime minister. See case of Lord Moira in 1812; 17 E. Hans. (3), 464; Wellington Desp., 3d ser., vol. 3, pp. 636-642; *Ib.* vol. 4, pp. 3, 17, 22. In 1851, after the resignation of the Russell administration, the Duke of Wellington was consulted, 114 E. Hans. (3), 1033, 1075. In 1855, after the resignation of Lord Aberdeen, among those consulted with respect to the formation of a new administration was the Marquis of Lansdowne, 123 E. Hans. (3), 1702. Greville's Memoirs, Reign of Queen Victoria, iii., 203, 207. In 1891, on the death of Sir John A. Macdonald, Sir John Thompson, minister of justice in the administration then dissolved, was called upon by Lord Stanley, governor-general of Canada, "for his advice with respect to the steps which should be taken for the formation of a new government." Can. Hans., June 16. It appears he was asked to form an administration, but declined the responsibility. *Ib.* June 23.

[2] When Sir Robert Peel took office in 1834, the principle was for the first time established that the premier should have the free choice of his colleagues. Peel, Mem. ii., 17, 27, 35.

more of the members of the previous administration in case of a reconstructed ministry, or of the political party in power in case of an entirely new cabinet, should remain in or enter the government, but while that may be a matter of conversation between himself and the premier, the Crown should never so press its views as to hamper the chief minister in his effort to form a strong administration.[1] As the leader of the government in parliament and a chief of the dominant political party for the time being, he is in the best position to select the materials out of which to construct a strong administration, and his freedom of choice should not be unduly restrained by the representative of the sovereign, except in cases where it is clear that imperial interests or the dignity or the honour of the Crown might be impaired, conditions almost impossible to arise in the formation of a ministry. The premier is the constitutional medium of communication between the governor-general and the cabinet; it is for him to inform his excellency of the policy of the government on every important public question, to acquaint him with all proposed changes or resignations in the administration. It is always allowable for a minister to communicate directly with the governor-general on matters of purely administrative or departmental concern; every minister is a privy councillor, and as such is an adviser of the Crown, whom the governor-general may consult if he thinks proper; but all matters of ministerial action, all conclusions on questions of ministerial policy, can only be constitutionally communicated to him by his prime minister. It is for the latter to keep the Crown informed on every matter of executive action.[2] It is not necessary that he should be told of the discussions and arguments that may take place in the cabinet while a question of policy is under its consideration, but the moment a conclusion is reached the governor-general must be made aware of the fact and his approval formally asked. All minutes and orders in council must be submitted for his approval or signature,

[1] See Torrens, Life of Melbourne, i., 233. Colchester's Diary, iii., 501.

[2] Hearn, 223.

and the fullest information given him on every question in which the Crown is interested and which may sooner or later demand his official recognition as the constitutional head of the executive.

When a new administration is formed—whether it is a mere reconstruction of an old cabinet under a new premier, or an entirely new government—there must be a thorough understanding between the prime minister and his colleagues on all questions of public policy which at the time are demanding executive and legislative action. The cabinet must be prepared to act as a unit on all questions that may arise in the legislature or in connection with the administration of public affairs, and if there be a difference of opinion between the premier and any of his colleagues, which is not susceptible of compromise, the latter must resign and give place to another minister who will act in harmony with the head of the cabinet.[1] While each minister is charged with the administration of the ordinary affairs of his own department, he must lay all questions involving principle or policy before the whole cabinet, and obtain its sanction before submitting it to the legislature. Once agreed to in this way, the measure of one department becomes the measure of the whole ministry, to be supported with its whole influence in parliament. The ministry is responsible for the action of every one of its members on every question of policy, and the moment a minister brings up a measure and places it on the government orders it is no longer his, but their own act which they must use every effort to pass, or make up their minds to drop in case it does not meet with the approval of the legislature.[2] The responsibility of the cabinet for each of

[1] Hearn, 218. Todd, i., 403.

[2] "The essence of responsible government is that mutual bond of responsibility one for another, wherein a government, acting by party, go together and frame their measures in concert." Earl of Derby, 134 E. Hans. (3), 834. "The government is not an administration of separate and distinct departments, but, as is well known, the measures of each department are submitted to the consideration of the cabinet, and the cabinet is responsible in its individual capacity for the policy of each department, though the execution of

its members must cease when a particular member of the cabinet assumes to himself the blame of any acts and quits the government in consequence; and while by remaining in office and acting together, all the members take upon themselves a retrospective responsibility for what any colleague has done, it ceases if they disavow and disapprove of the particular act upon the first occasion that it is publicly called in question.[1] If a government feels that it is compromised by the misconduct of a colleague, he must be immediately removed.[2]

If parliament should be sitting on the occasion of a ministerial crisis, it is usual to adjourn from day to day, and questions to be asked with respect to the progress made with the formation or reconstruction of a ministry.[3] The motion to adjourn may be made, when necessary, by one of the ex-ministers at the request of the person who has been entrusted with the duty of forming a ministry.[4] In case of a reconstruction it is customary for members of the former cabinet to make explanations until arrangements are finally made.[5] Sometimes explanations have been given in the Canadian Commons by a prominent member of the party, from which a new government is to be formed, and in the absence of ministers who have accepted office and sought re-election in

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the measures may rest with the departments themselves." Lord Palmerston, Mirror of P., 1838, p. 2429. Also Mr. Disraeli, 111 E. Hans. (3), 1332. See debate in Canadian Senate (1894, pp. 833-8), where action of a minister differing from his colleagues on a ministerial measure was deprecated.

[1] Lord Derby, 150 E. Hans., 579-670. A new ministry cannot be held responsible for the misconduct of one of their members under a previous administration. Todd, ii., 481. Also *Ib.* i., 540-543.

[2] Hearn, 198.

[3] For serious ministerial crisis of 1896, see Can. Com. Hans., Jan. 7-9. An adjournment was granted from day to day, but when it was moved to adjourn for five days, the motion was opposed as contrary to our constitutional practice. See remark of Mr. Laurier, then leader of the Opposition, p. 31.

[4] 123 E. Hans. (3), 1705, 1706; *Ib.* 1717.

[5] Sir Adolphe Caron on crisis in and reconstruction of Bowell cabinet, Jan. 7-15, 1896.

accordance with the law.[1] While a ministry is being reconstructed, or ministers are seeking re-election, it is not usual for the House to transact any business except what is purely routine.[2] In case there is difficulty in reconstructing a ministry, or in forming a new one, and public business is unduly delayed, parliament has always a right to address the Crown on the subject.[3] But it is unconstitutional for parliament "to question the motives of the sovereign for dismissing the ministers who have lost his confidence," or to make him "accountable to parliament for his conduct in changing his advisers."[4] Parliament should hesitate to pass any resolutions of censure or to take any steps which might appear like an attempt to limit the exercise of the prerogative by refusing to the new ministers and the Crown "a fair trial."[5]

A new ministry should take the earliest opportunity of making explanations to the houses of any facts that they ought to know with reference to its formation or its policy on measures of public import; but they have no right to ask for more than a general exposition of the main principles on which the government is formed.[6] Such explanations are as proper in the case of a reconstructed as of an entirely new ministry.[7] The houses have a perfect right to be correctly informed of the principles which have influenced public men either to accept office under the Crown or to undertake the scarcely less grave responsibility of leaving it. Whenever changes take place during the recess or the sitting of parliament, it is usual for the leader of the government when called upon in either house, to state the nature of the changes that have taken place in the administration, or make other expla-

[1] Hon. L. H. Holton in 1873, on formation of the Mackenzie ministry, Ann. Reg. (1878), 30.

[2] Mirror of P. 1830, pp. 272, 337; 114 E. Hans, (3), 889; 119 *Ib.* 914; 184 *Ib.* 692, 697, 722; Can. Com. Hans., Jan. 7-14, 1896.

[3] 136 E. Hans. (3), 1300; May, Const. Hist. i., 462.

[4] Lord Selkirk, 9 Parl. Deb. 377; Lord Colchester's Diary, ii., 119.

[5] Sir R. Peel, Memoirs, ii., 67; 191 E. Hans. (3), 1728.

[6] Mr. Disraeli and Mr. Gladstone, 138 E. Hans. (3), 2039.

[7] Mr. Disraeli, Mirror of P., 1840, pp. 24, 70.

nations that may be necessary in the public interests,[1] but such statements should not introduce any debatable matter, but be confined to such facts as ought to be made known to parliament.

When a ministry or any one of its members resigns, it is quite proper to give the grounds of resignation. Individual ministers may on occasions explain the reasons why they have retired from a government.

In all cases when a statement is made of the formation, the resignation, or the dismissal of a ministry, or of the retirement of an individual minister, the assent of the governor-general should be first obtained to make known any facts which affect his position in the matter.[2]

It is also authoritatively laid down that, when a single member of a cabinet retires, until he has made his own statement in the house to which he belongs, the government cannot explain the ground of his withdrawal to the other house.[3]

**VI. Responsibility of Ministers for Administration and Legislation.**—A government once formed is immediately responsible for the work of administration and legislation. As a rule, parliament should be reluctant to interfere with those details of administration which properly and conveniently appertain to a department, and it is only in cases where there is believed to be some infraction of the law or of the constitution or some violation of a public trust, that the house will interfere and inquire closely into administrative matters.[4] It must always

[1] Can. Hans. (1884), 28, 525; *Ib.* 1891, June 16; Sen. Deb. 1891, June 17. In 1889, the leader of the opposition was not satisfied with the short explanation given of changes in the ministry, and it was necessary to move the adjournment of the house, Hans. 24, 28. In 1891, a similar motion was made for the express purpose of bringing on a discussion as to the formation, the situation, and the principles of a new government. Hans., June 22. See Mr. Gladstone's recognition of the claim of the house to have explanations, 77 E. Hans. (3), 77; also 136 *Ib.* 941, 960.

[2] Can. Hans. (1891), June 16; Sen. Deb., June 17. Mirror of P., 1831-2, p. 2134.

[3] Todd. ii., 491; 136 E. Hans. (3), 939, 943, 960.

[4] May, Const. Hist. ii., 85. Todd, i., 418, 465-468.

be remembered that parliament is the court of the people, their grand inquest, to which all matters relating to the public conduct of a ministry or any of its members as heads of departments, must be submitted for review under the rules of constitutional procedure that govern such cases. By means of its committees parliament has all the machinery necessary for making complete inquiry, when necessary, into the management of a public department. Especially in relation to the public expenditures has the House of Commons the responsibility devolved upon it to see that every payment is made in accordance with law and economy, and that no suspicion of wrong-doing rests on the department having the disposition of any public funds.[1]

Every act done by the responsible minister of the Crown, having any political significance, is a fitting subject for comment, and, if necessary, for censure in either house.[2] But it is an admitted principle of sound constitutional government that the functions of parliament are, strictly speaking, those of control and not of administration, and undue interference with executive authority is most inexpedient, and an infraction of the Crown's prerogative.[3] Ministers are primarily

[1] See the reports of the committee of public accounts in the Canadian Commons Journals from 1867 to 1891—especially in the latter year—which illustrate the important functions assumed by this committee since its formation in 1867. Also the speeches of Sir R. Cartwright, ex-finance minister, and Sir J. Thompson, minister of justice, setting forth the functions and responsibilities devolving on this committee, Can. Hans., Aug. 19, 1891. Also, in the same session, proceedings and reports of the committee of privileges and elections, called upon to inquire into various allegations relating to certain tenders and contracts for public works in Canada.

[2] Earls Derby and Russell, 171 E. Hans. (3), 1720, 1728. Grey's Parl. Govt., 20.

[3] "Parliament has no direct control over any single department of the state. It may order the production of papers for its information, it may investigate the conduct of public business, may pronounce its opinion upon the manner in which every function of government has been or ought to be discharged; or it can convey its orders or directions to the meanest official with reference to his duty. Its power over the executive is exercised indirectly, but not the less effectively, through the responsible ministers of the Crown. These ministers regulate the duties of every department of the state and are responsible for

and always responsible for the administration of their respective departments, and it is for them to stand between the permanent non-political officials and the censure of the houses when the former are acting strictly within their functions as advisers and assistants of their political heads, immediately answerable to the parliament and the country for the efficient administration of public affairs.[1]

A government, however, will itself agree to submit to special parliamentary committees the investigation of certain questions of administration on which it may itself desire to elicit a full expression of opinion, and all the facts possible, but it is not the constitutional duty of such committee to lay down a public policy on any question of gravity. That is a duty of the responsible ministry itself, which should not be shifted on another body. The legislative and executive authorities should act as far as possible within their respective spheres. It is true the house acts, in a measure, in an executive capacity; it does so, not as a whole, but only through the agency of a committee of its own members—the government or ministry—and while it may properly exercise control and supervision over the acts of its own servants, it should not usurp their function and impede unnecessarily the executive action of the men to whom it has, from the necessity of things, constitutionally entrusted the management of administrative matters[2]

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their proper performance to parliament as well as the Crown. If parliament disapprove of any act or policy of the government, ministers must conform to that opinion, or forfeit its confidence." May's Constitutional History, ii., 85, 86. See also Macaulay's History of England, ii., 436.

[1] "Having entire control over the public departments, they [ministers] are bound to assume responsibility for every official act, and not to permit blame to be imputed to any subordinate for the manner in which the business of the country is transacted, except only in cases of personal misconduct for which the political chiefs have the remedy in their own hands." Todd i., 628, 629. Also *Ib.* ii., 217; 174 E. Hans. (3), 416, 184 *Ib.* 2164; 217 *Ib.* 1229; 219 *Ib.* 623; Grey's Parl. Govt., new ed., 300.

[2] See remarks of Lord Palmerston with respect to the necessity of leaving the royal prerogative unfettered as regards its exercise. 150 E. Hans. (3), 1357; 164 *Ib.* 99. Also Austin's Plea for the Constitution, 24.

Such questions can only be effectively administered by a body chosen expressly for that purpose. If it is clear that the ministry or any of its members are incompetent to discharge their functions, the House of Commons at once must evince its desire to recall the authority it had delegated to them, and the Crown, recognizing the right of that body to control its own committee, will select another set of men who appear to have its confidence and to whom it is willing to entrust the administration of public affairs.

Beside availing itself of the assistance of select parliamentary committees in special cases requiring the collection of evidence bearing on a question, the government may also, by the exercise of the prerogative[1] or in pursuance of statutory authority,[2] appoint a Royal Commission to make inquiry into matters on which the Crown or the country requires accurate and full information. In this way a great number of valuable facts preliminary to executive and legislative action may be elicited with respect to questions which are agitating the public mind. Questions affecting the relations of capital and labour,[3] the improvement and enlargement of the canal or railway system,[4] the employment of Chinese labour,[5] the collection of facts as to the practicability of a prohibitory liquor law,[6] are among the matters that can legitimately be referred to such royal commissions with the view of assisting the government and parliament in coming to a sound decision before agreeing to the passage of legislation on such subjects. Questions even affecting the honour of the government itself

[1] Todd, ii., 432.

[2] See Pacific Railway Commission of 1873, 2nd sess., Can Com. Jour. By c. 114, Rev. Stat. of Canada, whenever the governor-in-council deems it expedient to cause an inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof. Under the statute the commission may summon and enforce attendance of witnesses, who may be examined under oath. See Rev. Stat. of Can., c. 10.

[3] Can. Sess. P., 1889, No. A.

[4] *Ib.* 1871, No. 54.

[5] *Ib.* 1885, No. 54.

[6] See resolution passed in Canadian Commons, June 24, 1891.

have been referred to a royal commission in the interest of good government when a parliamentary committee has been unable to attain the object desired by the House of Commons.[1] While it may be sometimes decidedly for the public advantage that the Crown should itself appoint a commission to make full and impartial inquiry into such questions, it should in no wise interfere with the privileges and duties of parliament as the great political court of the country.

A commission should be careful not to enter upon any question of policy lest it should trench upon the proper limits of ministerial responsibility[2] and upon ground which belongs to parliament. All the expenses necessary for the performance of the functions assigned to a royal commission must be defrayed out of moneys annually voted by parliament for that purpose.[3]

Such commissions may be appointed on the recommendation of either house of parliament in the form of an address to the Crown,[4] or by the simple expression of opinion in favour of such a measure.[5] The report of such bodies is transmitted to parliament by command of the governor-general or by message.[6]

In 1900, in response to a demand for inquiry made in the House of Commons, the government appointed, by order-in-

[1] Charges in connection with the contemplated Canadian Pacific R. R. See despatches of Lord Dufferin, Can. Com. J., 1873 (2nd Sess.) Exception was, however, taken to the appointment of the commission as an interference with the right of the Commons to enquire into high political offences; pp. 226, 227. The commissioners in this trying case simply reported the evidence they had taken, and stated no conclusion, on the ground that the execution of their functions should not in any way "prejudice whatever proceedings parliament might desire to take." See also case of Sir A. Caron, Can. Com. Hans., and Jour. 4th May, 1892 (i., 2070, 2071). Names of commissioners were first communicated to the house, *Ib.* i., 2170; ii., 2980.

[2] Mr. Gladstone, 177 E. Hans. (3), 233, 236 and 217 *Ib.* 664. Sir Stafford Northcote, 184 *Ib.* 1731.

[3] See Can. Stat. for 1871, p. 7, Canal Commission.

[4] 118 E. Com. J. 250, 265, 363, 377; 119 *Ib.* 215, 229; 93 Lords' J. 633.

[5] Can. Com. J. 1891, June 24.

[6] *Ib.* (1885), 124; *Ib.* (1889), 271.

council, under c. 114, Can. Rev. Stat., certain eminent judges to be commissioners to investigate alleged fraudulent practices at Dominion elections.[1]

In addition to royal commissions, the government may appoint a departmental commission to make inquiries into matters connected with the official work of the public departments.[2]

In the evolution of parliamentary government ministers have become responsible not only for the legislation which they themselves initiate, but for the control and supervision of all legislation which is introduced by private members in either house. In the speech with which parliament is opened there is generally a reference to the leading measures which the government propose to present during the session. This speech, however, does not do more than indicate in almost abstract terms — terms intended to make the document unobjectionable from a political point of view—the intended legislation on matters of public interest. It is generally expected that the measures outlined in the speech will be introduced during the session; but it is admitted by authorities that "ministers are not absolutely bound to introduce particular measures commended to the consideration of parliament in the royal speech at the opening of the session. Sometimes the press of public business will necessitate the postponement of intended legislation to a future session." For instance, in 1870, the Queen's speech promised a licensing bill, a trade union bill and a legal taxation bill, none of which measures were brought down that session.[3]

It not unfrequently happens that a measure of large public import, on which there is a difficulty in arranging details and

[1] Com. Hans. (1900) ii., 6569. A reference to index "electoral frauds" will show nature of these charges of frauds.

[2] See Rev. Stat. of Can., c. 115. The civil service commission of 1880-81 was appointed by order-in-council to inquire into the condition of the public service of the Dominion and suggest improvements in its organization. It had not the power to administer oaths given generally to royal commissions under statute. See Can. Sess. P., 1881, No. 113.

[3] Todd, ii., 360; 202 E. Hans. (3), 486; 203 *Ib.* 1734.

a considerable difference of opinion, will be mentioned in the speech, but will not be actually proposed until a subsequent session, when the public sentiment is more ready to accept it. A franchise act for the Dominion was mentioned several times in the governor-general's speeches from 1867 to 1885, but it was not until the latter year that it became law.[1] In the case of a bill consolidating and amending the law relating to bills of exchange and promissory notes, necessarily involving numerous details of deep interest to the whole business community, it was presented and printed in 1889, but not passed until the subsequent session, when it had been thoroughly reviewed by all interested in its provisions.[2] The consolidation of the criminal laws was not pressed in 1891, but held over until the following session in order to give the judges and the legal profession sufficient time to consider a measure of so much importance. This practice in the case of bills of this character may be justified on the ground that it tends to prevent hasty legislation.[3]

It is the duty of the government to initiate or promote legislation on every large question of public policy which requires attention at the hands of the legislature.

No feature of the English system of parliamentary government stands out in such marked contrast with the irresponsible system that prevails in the congress of the United States as that which requires that there shall be a body of men specially chosen from the majority to lead parliament, and made immediately responsible not only for the initiation and supervision of public legislation,[4] but for the control of

[1] *Supra*, 61.

[2] Can. Hans. (1889), 778, 1629; *Ib.* (1890), 26.

[3] Can. Hans., 1891, May 12.

[4] Todd, ii., 394. Hearne, 536. Mr. Gladstone, 192 E. Hans. (3), 1190-1194. A select committee on the public business of the English Commons has set forth that "although it is expedient to preserve for individual members ample opportunity for the introduction and passage of legislative measures, yet it is the primary duty of the advisers of the Crown to lay before parliament such changes in the law as in their judgment are necessary; and while they possess

private measures so far as they may concern the public at large.

While private members have a perfect right to present bills on every subject except for the imposition of taxes and the expenditure of public money, they do not act under that sense of responsibility which naturally influences ministers who are the leaders of the house and amenable to parliament and the Crown for their policy on all matters of public legislation. Ministers alone can initiate measures of public taxation and expenditure under the constitutional law, which gives control of such matters to the Crown and its advisers, while the conventions and understandings of the constitution have gradually entrusted them also with the direction and supervision of every matter which demands legislative enactment. In the ordinary nature of things no measure introduced by a private member can become law unless the ministry gives facilities for its passage. If the house should press on their attention a particular measure, they must be prepared to give it full consideration and assume ministerial responsibility for its passage or rejection. They must on all occasions have a policy on every question of public interest, and cannot evade it if they wish to retain the confidence of parliament and of the country. As a rule, private members perform a useful public duty in bringing up measures which illustrate public sentiment in various directions. Parliament is essentially a deliberative body, and its not least important function is to prepare the public mind for useful legislation and to give it effect at the earliest possible moment. Private members consequently can materially assist the government by their suggestions for the amendment of the law. It would, however, be an evasion of the sound principle of ministerial responsibility if a government should attempt, by means of

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the confidence of the H. of C. and remain responsible for good government and for the safety of the state, it would seem reasonable that a preference should be yielded to them, not only in the introduction of their bills, but in the opportunity of pressing them on the consideration of the house." E. Coms. Pap., 1861, vol. xi., p. 436.

purely abstract resolutions or by the agency of select committees, to obtain from parliament the enunciation of the principles that should guide them in maturing a measure which imperatively demands legislation at their hands.[1] It is their duty to gauge public opinion on every subject from the utterances of public men and of the public press, and lay down the main features of the policy that should be adopted. Having submitted a measure to the consideration of parliament, they should be ready to perfect it by the assistance of the houses.

The rules of parliament are framed for the special purpose of giving every opportunity to the house itself to consider a measure and amend it at various stages. Ministers should always be ready to adopt such amendments as are compatible with the general principles of the measure, and should they feel compelled to recede from any position which they have taken, it is a proper concession to the superior wisdom of a deliberative body, and no confession necessarily that they have lost the confidence of the legislature. It is for them to press, as far as reason and consistency dictate, their own views as to details and endeavour as a rule to arrive at a compromise rather than ultimately lose a measure.

A distinguished English statesman whose judicial fairness in matters of constitutional procedure is admitted by all students of political science, has well said that he "did not think it would be for the public advantage if a government should consider itself bound to carry every measure in the house exactly in the shape they had proposed it, but he hoped that, with respect to questions of legislation affecting the whole body of the people, of whose feelings so many members must be cognizant, the house would retain some of its legislative authority."[2] Another eminent statesman has admitted

[1] See remarks of Mr. Lowe on a proposition of Mr. Disraeli to go into committee of the whole to consider the question of a reform act; 185 E. Hans. (3), 960. Also Earl Grey, 1294-1298. Mr. Gladstone's proposed motion; *Ib.* 1021, 1022. See also 233 *Ib.* 1753, 1825.

[2] Lord John Russell, 73 E. Hans. (3), 1638.

that "with respect to many great measures, the sense of the legislature ought to prevail; and that if no great principle be involved and very dangerous consequences are not expected to result, the government ought not to declare to parliament that they stake their existence as a government on any particular measure, but are bound on certain occasions to pay proper deference to the expressed opinions of their supporters."[1] But it must be added, if the measure under consideration embodies a policy to which the political faith of the ministers is pledged, which they consider indissolubly connected with their own existence as a government, chosen from a particular party, and from which they cannot recede without a sacrifice of principle and dignity, they must at once assume the ground that its defeat or material amendment means their resignation or an appeal to the people in case they believe the house does not represent the sentiment of the country on the question at issue.

Isolated defeats of a government possessing the confidence of parliament, do not necessarily demand a resignation, but when the people's house continues to refuse its confidence to them, it is impossible for them to remain in office.[2]

Although it is not expedient for a minister of the Crown to take charge of a private bill, it is the special duty of the government as the responsible leaders of legislation and the chosen guardians of the public interests in parliament, to watch carefully the progress of private legislation, and see that it does not in any way interfere with the policy of the ministry or the statutory law in reference to the public lands, railways, canals, public works, and such other interests as are entrusted to the Dominion authorities. It is in the standing committees that the supervision of private bill legislation is chiefly exercised. One of the most important committees of the Commons, that of railways, canals and telegraph lines, has invariably for its chairman one of the ministers of the Crown, and the minister in charge of railways is also one of its

[1] Sir R. Peel, 73 E. Hans. (3), 1639, 1640.

[2] Lord John Russell, Mirror of P., 1841, pp. 2119, 2120.

members, whose special duty it is to watch closely all legislation that may affect the policy of the government.[1]

In a country like Canada, stretching over such a wide area of territory, having so many diversified interests and resources, requiring to be developed by public and private legislation, the committees of this class have great responsibilities resting upon them. The federal system divides the jurisdiction over a great variety of subjects between the Dominion and the provinces, and it is therefore the special duty of each government to see that questions of conflict are avoided and each legislative authority acts within the fundamental law.

**VII. Orders-in-Council.**—Among the many important responsibilities which a ministry is called upon to perform in the discharge of its executive and administrative functions is the issue of what are known as "Orders-in-Council." Parliament itself being unable to legislate for all the details of a measure of government which it may sanction, is forced, as a matter of convenience and necessity, to entrust to the ministry the privilege of issuing certain rules and regulations necessary for the effective administration of matters in charge of certain departments of government. Such rules and regulations are framed by each department separately, but in order to give them the validity of law they must be authorized by the governor-in-council—that is to say, each department submits these rules to the council, and when they are approved by the governor-general on the recommendation of that body, they have the force of a statutory enactment. The executive in this respect acts in a *quasi* legislative capacity. Its authority, as a rule, is derived from the various statutes regulating the procedure in all matters to which these orders relate. In England, the Crown, by virtue of its prerogative, can issue

[1] Even in England, where the practice is to leave the supervision of private bills to small semi-judicial committees, of which ministers are not members, the government is "responsible for exercising the prerogative of the Crown so as to control all legislation in parliament, whether upon public or private matters, for the furtherance of the public welfare, and for the protection of private rights from unjustifiable aggression." Todd, ii., 389.

certain proclamations and orders. It is in this way parliament is summoned, prorogued, and dissolved. In Canada similar powers are exercised in accordance with the law. Many orders-in-council, which appear every year in the operations of the departments of government, have the direct authority of legislative enactment. By reference to the statutes relating to the public departments, the management and expenditure of the public revenues, the granting of patents and copyrights, tolls on canals, public wharves and docks and railways, the prevention of contagious diseases among cattle, quarantine and health, the collection of criminal and other statistics, the control of the coasting trade, adulteration of food and drugs, the administration of affairs in the district of Keewatin, the management of penitentiaries, and countless other matters, we see how extended a measure of legislative authority has been entrusted to the governor-in-council.[1] These orders are published regularly in the *Canada Gazette*—and in the *Gazettes* of the provinces when the orders are issued by the provincial executive—for the information of all persons affected by the regulations in question. Copies of all rules, regulations, forms, and other details of administrative action necessary under the law, should appear in the reports of each department entrusted with the management of such matters.

It is by orders-in-council that the acts of the legislature are disallowed by the governor-general, and proclamations to that effect must appear in the *Canada Gazette*. It is always competent for parliament by formal address to the governor-general to obtain possession of all orders in pursuance of law, and consequently a great number of such documents are annually laid upon the table of the house for the information of members.[2] Parliament having delegated a certain legislative power to the executive, has a right to review its action in all

[1] See "Consolidated orders-in-council of Canada published under the authority and direction of the governor-general." By H. H. Bligh, Q.C., 1889. Also orders at commencement of Dominion statutes every year.

[2] See "accounts and papers" in index to journals of Can. House of Commons.

cases and judge whether it has exercised the functions strictly in accordance with law.

In addition to the orders issued in pursuance of parliamentary authority by the privy council of Canada, there also appear in the *Canada Gazette* and the Canadian statutes from time to time, certain imperial orders-in-council, applicable to the Dominion, and necessary to bring various imperial enactments and treaties into force in that country. For instance, the provinces of British Columbia and Prince Edward Island were brought legally into the confederation in pursuance of orders-in-council issued under the authority of the British North America Act of 1867.[1]

**VIII. Proceedings on Resignation of Ministers.**—When a ministry is defeated in parliament its members must resign their respective offices of state unless the political conditions are such as to justify the governor-general to grant them an appeal to the people. When, however, they are prepared to give way to a new government, they only remain in office until their successors are appointed. Up to that time they should carry on the work of their departments. If the political body known as the cabinet or ministry is dissolved *ipso facto* by the death, resignation or dismissal of the chief minister, the heads of departments continue to hold office until they are asked to retire or continue in office by the new premier.[2] It is always understood that in such an event it is for the premier to intimate his wishes in the matter. In this case, however, it is the understandings and conventions of the constitution that control the formation of the ministry.

From a legal point of view the heads of departments, such as the minister of railways, the minister of finance, or the minister of public works, hold their office by statutory

[1] Can. Stat. of 1872 and 1873, B. N. A. Act, s. 146.

[2] 16 Parl. Deb., 735; 195 E. Hans. (3), 734. Mirror of P. 1830, pp. 273, 536, 541; *Ib.* 1834, p. 2720. Todd ii., 513. See Toronto *Empire*, June 8, 1891, for article by present author on historical precedents as to constitutional course to be followed in consequence of death of Sir John A. Macdonald, the prime minister, on the 6th June.

enactment regulating their respective departments.[1] Their offices are held "during pleasure," and they must either formally resign or be formally dismissed when the cabinet is dissolved in accordance with constitutional understandings. The premier, in the case of ministerial changes, is the official medium of communication by whom the representative of the sovereign is informed of all the circumstances.[2] In case an entirely new ministry is formed by the premier, and all the members of the former administration have resigned, those members of the privy council who accept a departmental office in the government must seek re-election in conformity with the statute regulating the independence of parliament.[3] The fact that a man is sworn to the privy council, and is a member of the political body known as the cabinet or ministry for the time being, does not vacate a seat in parliament and demand a re-election by the people, but the fact that a privy councillor is appointed to a certain salaried office mentioned in the statute in question. When there is a reconstruction of a cabinet, on the death or resignation of a premier, no re-election is necessary in the case of those departmental heads who continue to hold office in the government, though it may be a new government in a political sense.[4] Even if a minister should resign his former office and

[1] *Supra*, 53 *et seq.*

[2] 205 E. Hans. (3), 1290; Wellington Despatches, 3d Ser., vol. iv., pp. 210, 213, 215. It is competent, however, for a minister to resign his office at a formal interview with the sovereign or her representative. Lewis, Administrations, 448, note. Walpole, Life of Perceval, ii., 234.

[3] Dom. Rev. Stat., c. 11, sub-s. 3, s. 9.

[4] For instance, on the death of Sir E. Taché in 1865, Sir Narcisse Belleau was made premier. The former members of the cabinet remained in office. See Turcotte, Canada Sous l'Union, ii., 565, 566. On the death of Sir John Macdonald, in 1891, Mr. Abbott, a member of the privy council and leader of the Senate, was appointed premier, and all members of the former administration retained their offices. Also case of administration formed by Mr. (Sir) Mackenzie Bowell, Dec. 13, 1894, on death of Sir John Thompson in Windsor Castle, where he had just taken the oath of an imperial privy councillor. See Statistical Year Book of Canada, where there are lists of ministers of each cabinet. For English cases: Liverpool administration on assassination of Mr.

take another in the new administration, no re-election is necessary in his case. It is not necessary either under the English or the Canadian law for a minister to vacate his seat in case he is re-appointed to an office he had resigned upon a change of ministry, unless some one else had been appointed and held the office in the interim. As stated by high authority, "ministerial offices are not vacated by a mere resignation, but only on the appointment of a successor."[1] The Canadian law, as shown elsewhere, provides only for a re-election in the case of a minister resuming office after he has resigned and a successor in a new administration has occupied the same office.[2] Members of a government are sworn in as privy councillors, and consequently when a new cabinet is formed, those men who have been previous to that event sworn in as members of the Queen's privy council for Canada need not again take the oath of office which binds them to secrecy,[3] while acting in that capacity. Once privy councillors, they remain so until formally dismissed for good and sufficient cause by the Crown.[4] If reinstated, then they must again be sworn in as privy councillors.[5] Ministers, who change departmental offices in case of a reconstruction or dissolution of a cabinet, or otherwise, must take the oath of office of their

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Perceval in 1812, Twiss, Life of Lord Eldon, i., 493, 497; Russell administration on death of Viscount Palmerston in 1865, Ann. Reg. (1865), 159; Disraeli administration on retirement of Earl of Derby in 1868, Todd, i., 240.

[1] See 2 Hatsell, 45 note, 394.

[2] *Supra*, 185.

[3] "The obligation of keeping the king's counsel inviolably secret is one that rests upon all cabinet ministers and other responsible advisers of the Crown, by virtue of the oath which they take when they are made members of the privy council." Todd, ii., 84. See *Ib.* 83, 84.

[4] For instance, when Mr. Abbott was chosen premier in 1891, on the death of Sir John Macdonald, it was not necessary for him to be sworn in, as he was already a member of the privy council and of the cabinet constitutionally dissolved.

[5] Case of Mr. Fox, dismissed in 1798, and reinstated in 1806, Jesse, Geo. III., vol. iii., pp. 361, 472. Also of Lord Melville, resworn of the council, after his dismissal for alleged malfeasance in office. Haydn's Book of Dignitaries, 135.

new department.[1] In case of the demise of the sovereign, all privy councillors, lieutenant-governors, judges, and all persons holding a commission from the Crown, must again take an oath of allegiance. Members of all legislative bodies must do the same at the earliest opportunity.[2]

**IX. The Law and Usages of Parliament.**—It will be seen from the foregoing brief review how largely the precedents and conventions of the political constitution of England mould and direct the parliamentary government of Canada. The written or fundamental law lays down only a few distinct rules with reference to the executive and legislative authority in the Dominion and the provinces, and leaves sufficient opportunity for the play and operation of those flexible principles which have made the parliamentary government of England and of her dependencies so admirably suited to the development of the best energies and abilities of a people.

Like the common law of England itself, the system of parliamentary government which Canadians now possess—to apply the language of an eminent American publicist with respect to the common law—"is the outgrowth of the habits of thought and action of the people. Its maxims are those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority are not recognized in its principles."[3]

The law and custom of parliament necessarily forms an important feature of the political system briefly outlined in the present chapter. The code of rules and usages which the Canadian legislatures possess has been mainly derived from that great system of conventional law which has been moulded and worked out by the experience of centuries of the illustrious prototype of all representative and popular assemblies through-

[1] Cases of Sir C. H. Tupper, Messrs. Bowell and Ives, Dec. 21, 1894.

[2] On death of Queen Victoria and accession of King Edward VII. to the throne, Jan. 22, 23, 1901; Canada Gazette, Feb. 2, 1901; Can. Rev. Stat., c. 19, s. 1, 3, 4.

[3] Cooley, Constitutional Limitations, pp. 32, 33.

out the world.[1] Some changes have necessarily been made in the course of time by the Canadian assemblies in their methods of procedure, but on the whole, the main principles of English parliamentary law have been retained in all their integrity and have had their due influence in shaping the parliamentary institutions of the country. By instituting a regular and orderly procedure for the transaction of public business, by affording legitimate opportunities for the free expression of opinion on every measure of importance, by providing an effective machinery for amending and perfecting legislation, by preventing surprise and haste in the discussion of public measures, by protecting a minority from the tyranny of a majority, by preventing as far as possible unnecessary excitement and the adoption of rash measures, by requiring that every motion shall be in writing and subject to certain rules before it can be passed—by conserving all these old and valued principles and usages,[2] the parliamentary procedure of Canada is sufficient to insure that calm deliberation and caution which are absolutely essential for the conduct of public business. It is true at times the patience of the popular assemblies has been severely tried by the efforts of violent partisanship, and the legitimate limits of discussion have been much exceeded, especially in committees of the whole, but it has been thought preferable so far to ignore such temporary ebullitions of political excitement, and to adhere to those rules which give every opportunity to free criticism and in the end insure a

[1] Lieber dwells upon parliamentary law as an essential guarantee of freedom and one of the especial glories of the Anglican race. Civil Liberty, 153.

[2] Referring to the National Assembly of France, Sir Samuel Romilly (Life, i., 75) says: "Much of the violence which prevailed in the assembly would have been allayed and many rash measures unquestionably prevented if their proceedings had been conducted with order and regularity. If one single rule had been adopted, namely, that every motion should be reduced to writing before it was put from the chair, instead of proceeding, as was their constant course, by first resolving the principle, as they called it (décréter le principe), and leaving the drawing up of what they had so resolved, or as they called it (la rédaction), for a subsequent operation, it is astonishing how great an influence it would have had on their debates and on their measures."

deliberate conclusion on every subject of public importance. In short, the Canadian representative assemblies are able to give the fullest expression of their will through those rules of procedure which they have adopted from the English code, and consequently their history illustrates both in this and other particulars, briefly reviewed in this chapter, how closely they adhere to those principles and methods of legislation and administration which have made England and her dependencies the freest self-governing communities of the world.

We have now briefly reviewed the most important phases in the development of the constitutional system of the Dominion of Canada. We have seen how the autocratic, illiberal government of New France, so repressive of all individual energy and ambition, gave place, after the conquest, to representative institutions well calculated to stimulate human endeavour and develop national character. Step by step we have followed the progress of those free institutions which are now in thorough unison with the expansion of the provinces in wealth and population. At last we see all the provinces politically united in a confederation, on the whole carefully conceived and matured; enjoying responsible government in the completest sense, and carrying out at the same time, as far as possible, those British constitutional principles which give the best guarantee for the liberties of a people. With a federal system which combines at once central strength and local freedom of action; with a permanent executive independent of popular caprice and passion; with a judiciary on whose integrity there is no blemish, and in whose learning there is every confidence; with a civil service resting on the firm basis of freedom from politics and of security of tenure; with a people who respect the law and fully understand the workings of parliamentary institutions,

the Dominion of Canada need not fear comparison with any other country in those things which make a community truly happy and prosperous.[1]

[1] The words of the Marquess of Lorne (now the Duke of Argyll), in reply to the farewell address of the parliament of Canada, 25th May, 1883, may be appropriately cited here as the impartial testimony of a governor-general after some years' experience of the working of Canadian institutions :—

"A judicature above suspicion ; self-governing communities entrusting to a strong central government all national interests ; the toleration of all faiths, with favour to none ; a franchise recognizing the rights of labour, by the exclusion only of the idler ; the maintenance of a government not privileged to exist for any fixed term, but ever susceptible to the change of public opinion, and ever open, through a responsible ministry, to the scrutiny of the people :—these are the features of your rising power."

## *APPENDIX.*

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# APPENDIX.

## A.

### *THE BRITISH NORTH AMERICA ACT*, 1867.

ANNO TRICESIMO ET TRICESIMO-PRIMO VICTORIÆ REGINÆ, CAP. III.

*An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof, and for purposes connected therewith.*

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament, it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

## I.—PRELIMINARY.

Short Title.

1. This Act may be cited as the British North America Act, 1867.

Application of Provisions referring to the Queen.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

## II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be One Dominion under the name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

Construction of subsequent Provisions of Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

Four Provinces.

5. Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Provinces of Ontario and Quebec.

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form Two Separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

Decennial Census.

8. In the general Census of the Population of Canada which is hereby required to be taken in the year One thousand eight hundred and seventy-one, and in every

Tenth year thereafter, the respective Populations of the Four Provinces shall be distinguished.

### III.—EXECUTIVE POWER.

Declaration of Executive Power in the Queen.

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of Provisions referring to the Governor-General.

10. The Provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

Constitution of Privy Council for Canada.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor-General.

All powers under Acts to be exercised by Governor-General with advice of Privy Council, or alone.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union, in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor-General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

Application of Provisions referring to Governor-General in Council.

13. The Provisions of this Act, referring to the Governor-General in Council shall be construed as referring to

the Governor-General acting by and with the Advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorize Governor-General to appoint Deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor-General such of the Powers, Authorities and Functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor-General himself of any Power, Authority, or Function.

Command of armed Forces to continue to be vested in the Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada.

16. Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

### IV.—LEGISLATIVE POWER.

Constitution of Parliament of Canada.

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, &c., of Houses.

18. The Privileges, Immunities, and Powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.[1]

First Session of the Parliament of Canada.

19. The Parliament of Canada shall be called together not later than Six months after the Union.

Yearly Session of the Parliament of Canada.

20. There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

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[1] Amended by 38-39 Vict., c. 38. See *infra*, App. C.

*The Senate.*

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators. Number of Senators.

22. In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:— Representation of Provinces in Senate.

(1.) Ontario;

(2.) Quebec;

(3.) The Maritime Provinces: Nova Scotia and New Brunswick; which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia and Twelve thereof representing New Brunswick.

In the case of Quebec, each of the Twenty-four Senators representing that Province shall be appointed for one of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A, to Chapter One of Consolidated Statutes of Canada.

23. The Qualifications of a Senator shall be as follows:— Qualifications of Senator.

(1.) He shall be of the full Age of Thirty years.

(2.) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.

(3.) He shall be legally or equitably seized as of Freehold for his own Use and Benefit of Lands or Tenements held in free and Common Soccage, or seized or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the value of Four Thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages and Incumbrances due or payable out of, or charged on or affecting the same;

(4.) His Real and Personal Property shall be together worth four Thousand Dollars over and above his Debts and Liabilities;

(5.) He shall be resident in the Province for which he is appointed;

(6.) In the Case of Quebec, he shall have his Real Property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

Summons of Senator.

24. The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the Provisions of this Act, every person so summoned shall become and be a Member of the Senate and a Senator.

Summons of First Body of Senators.

25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Addition of Senators in certain cases.

26. If at any Time, on the Recommendation of the Governor-General, the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor-General may, by Summons to Three or Six Qualified Persons (as the case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

Reduction of Senate to normal number.

27. In case of such Addition being at any Time made, the Governor-General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators, and no more.

Maximum number of Senators.

28. The Number of Senators shall not at any time exceed Seventy-eight.

Tenure of place in Senate.

29. A Senator shall, subject to the Provisions of this Act, hold his place in the Senate for life.

Resignation of place in Senate.

30. A Senator may, by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators.

31. The place of a Senator shall become vacant in any of the following cases:—

(1.) If for two Consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

(2.) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience or Adher-

ence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen of a Foreign Power;

(3.) If he is adjudged Bankrupt or Insolvent, or applies for the benefit of any Law relating to Insolvent debtors, or becomes a public defaulter;

(4.) If he is attainted of Treason, or convicted of Felony or of any infamous Crime;

(5.) If he ceases to be qualified in respect of Property or of Residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of Government of Canada while holding an Office under that Government requiring his Presence there.

Summons on vacancy in Senate.

32. When a vacancy happens in the Senate by Resignation, Death or otherwise, the Governor-General shall, by Summons to a fit and qualified Person, fill the Vacancy.

Questions as to qualifications and vacancies in Senate.

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate, the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate.

34. The Governor-General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

Quorum of Senate.

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the exercise of its Powers.

Voting in Senate.

36. Questions arising in the Senate shall be decided by a majority of Voices, and the Speaker shall in all Cases have a vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

### *The House of Commons.*

Constitution of House of Commons in Canada.

37. The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

Summoning of House of Commons.

38. The Governor-General shall from Time to Time, in the Queen's name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons.

39. A Senator shall not be capable of being elected, or of sitting or voting as a Member of the House of Commons.

Electoral Districts of the four Provinces

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows :—

I.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

II.—QUEBEC.

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

III.—NOVA SCOTIA.

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

IV.—NEW BRUNSWICK.

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John

shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

Continuance of existing Election Laws until Parliament of Canada otherwise provides.

41. Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely, —the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of Controverted Elections and Proceedings incident thereto, the vacatimg of Seats of Members, and the Execution of new Writs, in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Proviso as to Algoma.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

Writs for first Election.

42. For the First Election of Members to serve in the House of Commons, the Governor-General shall cause Writs to be issued by such Person, in such Form and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

As to Casual Vacancies.

43. In case a vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the

Parliament in this behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to Election of Speaker of House of Commons.

44. The House of Commons, on its first assembling after a general Election, shall proceed with all practicable speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker.

45. In case of a Vacancy happening in the Office of Speaker, by Death, Resignation or otherwise, the House of Commons shall, with all practicable Speed, proceed to elect another of its Members to be Speaker.

Speaker to preside.

46. The Speaker shall preside at all meetings of the House of Commons.

Provision in case of absence of Speaker.

47. Until the Parliament of Canada otherwise provides, in case of the Absence, for any Reason, of the Speaker from the Chair of the House of Commons for a period of Forty-eight Consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall, during the Continuance of such Absence of the Speaker, have and execute all the Powers, Privileges and Duties of Speaker.

Quorum of House of Commons.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons.

50. Every House of Commons shall continue for Five Years from the day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer.

Decennial Readjustment of Representation.

51. On the completion of the Census in the Year one thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such a manner, and from such time as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:—

(1.) Quebec shall have the fixed Number of Sixty-five Members;

(2.) There shall be assigned to each of the other Provinces such a number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained);

(3.) In the Computation of the Number of Members for a Province, a fractional Part not exceeding One-half of the whole number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One-half of that number shall be equivalent to the whole number?

(4.) On any such Readjustment the Number of Members for a Province shall not be reduced unless the Proportion which the number of the Population of the Province bore to the Number of the aggregate population of Canada at the then last preceding Readjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One-twentieth Part or upwards;

(5.) Such Readjustment shall not take effect until the Termination of the then existing Parliament.

Increase of number of House of Commons.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

*Money Votes; Royal Assent.*

Appropriation and Tax Bills.

53. Bills for appropriating any part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of money votes.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any purpose, that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Royal Assent to Bills, &c.

55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's Assent, he shall declare, according to his discretion, but subject to the Provisions of this Act and to Her Majesty's

Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by Order in Council of Act assented to by Governor-General.

56. Where the Governor-General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor-General, by speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's pleasure on Bill reserved.

57. A bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

## V.—PROVINCIAL CONSTITUTIONS.

### *Executive Power.*

Appointment of Lieutenant-Governors of Provinces.

58. For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

Tenure of office of Lieutenant-Governor.

59. A Lieutenant-Governor shall hold Office during the Pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the First Session of the Parliament of Canada shall not be removable within Five Years from his Appointment, except for cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting,

and if not then, within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant-Governors.

60. The Salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Oaths, &c., of Lieuten't-Governor.

61. Every Lieutenant-Governor shall, before assuming the Duties of his office, make and subscribe before the Governor-General or some Person authorized by him, Oaths of Allegiance and Office similar to those taken by the Governor-General.

Application of provisions referring to Lieutenant-Governor.

62. The Provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the Time being of each Province or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec.

63. The Executive Council of Ontario and Quebec shall be composed of such Persons as the Lieutenant-Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec, the Speaker of the Legislative Council and the Solicitor-General.

Executive Government of Nova Scotia and New Brunswick.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union, until altered under the Authority of this Act.

Powers to be exercised by Lieutenant-Governor of Ontario or Quebec with advice or alone.

65. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any Number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be

exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the Advice, or with the Advice and consent of, or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec.

Application of provisions referring to Lieutenant-Governor in Council.

66. The Provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

Administration in absence, etc., of Lieutenant-Governor.

67. The Governor-General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant-Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

*Legislative Power.*

1.—ONTARIO.

Legislature for Ontario.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of One House, styled the Legislative Assembly of Ontario.

Electoral Districts.

70. The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2.—QUEBEC.

Legislature for Quebec.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of Legislative Council.

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the

Lieutenant-Governor in the Queen's Name by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors.

73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation, Disqualification, &c.

74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies.

75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death or otherwise, the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

Questions as to Vacancies, &c.

76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council.

77. The Lieutenant-Governor may, from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

Quorum of Legislative Council.

78. Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all cases have a Vote, and when the Voices are equal, the Decision shall be deemed to be in the negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it

shall not be lawful to present to the Lieutenant-Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant-Governor, stating that it has been so passed.

## 3.—ONTARIO AND QUEBEC.

First Session of Legislatures.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

Summoning of Legislative Assemblies.

82. The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of holders of offices.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec, any Office, Commission or Employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual Salary, or any Fee, Allowance, Emolument or profit of any kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec, Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office.

Continuance of existing election laws.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the

Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the trial of Controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members, and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution, shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any Election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the Law of the Province of Canada to vote, every male British Subject aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject, nevertheless, to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer.

Yearly Session of Legislature.

86. There shall be a Session of the Legislature of Ontario and of that of Quebec, once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

Speaker, quorum, &c.

87. The following Provisions of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of Voting, as if those Provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

## 4.—NOVA SCOTIA AND NEW BRUNSWICK.

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act;

and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

### 5.—ONTARIO, QUEBEC AND NOVA SCOTIA.

First elections.

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia, shall cause Writs to be issued for the first Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor-General directs, and so that the first Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

### 6.—THE FOUR PROVINCES.

Application to Legislatures of provisions respecting money votes, &c.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen, and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

### VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

#### *Powers of the Parliament.*

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all

Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The Raising of Money by any Mode or System of Taxation.
4. The Borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country, or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

*Exclusive Powers of Provincial Legislatures.*

Subjects of exclusive Provincial Legislation.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The Borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices, and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province, and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses, in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings, other than such as are of the following Classes,—

*a.* Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings, connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

*b.* Lines of Steamships between the Province and any British or Foreign Country:

*c.* Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of subjects enumerated in this Section.
16. Generally all matters of a merely local or private nature in the Province.

*Education.*

Legislation respecting education.

**93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by law in the Province at the Union;

(2.) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects, shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3.) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4.) In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section, and of any Decision of the Governor-General in Council under this Section.

*Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.*

Legislation for uniformity of laws in three Provinces.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that behalf, the Power of the Parliament of Canada to make Laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity, shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

*Agriculture and Immigration.*

Concurrent powers of legislation respecting agriculture, &c.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province, relative to Agriculture or to Immigration, shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII.—JUDICATURE.

Appointment of Judges.

96. The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province,

except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, &c.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges of Superior Courts.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

Salaries, &c., of Judges.

100. The Salaries, Allowances and Pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick) and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

General Court of Appeal, &c.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

### VIII.—REVENUES; DEBTS; ASSETS; TAXATION.

Creation of Consolidated Revenue Fund.

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union, had and have power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the manner and subject to the charges in this Act provided.

Expenses of collection, &c.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Man-

ner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Interest of Provincial public debts.

104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

Salary of Governor-General.

105. Unless altered by the Parliament of Canada, the Salary of the Governor-General shall be Ten Thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

Appropriation from time to time.

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of stocks, etc.

107. All Stocks, Cash, Bankers' Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the amount of the Respective Debts of the Provinces at the Union.

Transfer of property in Schedule.

108. The Public Works and Property of each Province enumerated in the Third Schedule to this Act shall be the Property of Canada.

Property in lands, mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same.

Assets connected with Provincial debts.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial debts.

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the Debt of the

Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per centum per annum thereon.

Assets of Ontario and Quebec.

113. The Assets enumerated in the Fourth Schedule to this Act, belonging at the Union to the Province of Canada, shall be the Property of Ontario and Quebec conjointly.

Debt of Nova Scotia.

114. Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the rate of Five per centum per annum thereon.

Debt of New Brunswick.

115. New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the rate of Five per centum per annum thereon.

Payment of interest to Nova Scotia and New Brunswick.

116. In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive, by half-yearly Payments in advance from the Government of Canada, Interest at Five per centum per annum on the difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial public property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the country.

Grants to Provinces.

118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures:

| | DOLLARS. |
|---|---|
| Ontario - - - - - - - - - - | Eighty thousand. |
| Quebec - - - - - - - - - - | Seventy thousand. |
| Nova Scotia - - - - - - - - | Sixty thousand. |
| New Brunswick - - - - - - - | Fifty thousand. |
| | Two hundred and Sixty thousand; |

and an annual Grant in aid of each Province shall be made, equal to Eighty cents per Head, of the Population as ascertained by the Census of One thousand eight hun-

dred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grant shall be in full Settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all sums chargeable as Interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

Further grant to New Brunswick.

119. New Brunswick shall receive, by half-yearly Payments in advance from Canada, for the Period of Ten Years from the Union, an additional Allowance of Sixty-three thousand Dollars per annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a deduction equal to the Interest at five per centum per annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

Form of Payments.

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick, respectively, and assumed by Canada, shall until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor-General in Council.

Canadian manufactures, etc.

121. All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of customs and excise laws.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

Exportation and importation as between two Provinces.

123. Where Custom Duties are, at the Union, leviable on any Goods, Wares or Merchandises in any Two Provinces, those Goods, Wares and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of Importation.

Lumber dues in New Brunswick.

124. Nothing in this Act shall affect the right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New

Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

Exemption of public lands, &c.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

Provincial consolidated revenue fund.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union, Power of Appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the Special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

## IX.—MISCELLANEOUS PROVISIONS.

### *General.*

As to Legislative Councillors of Provinces becoming Senators.

127. If any Person, being at the passing of this Act, a Member of the Legislative Council of Canada, Nova Scotia or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand, addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate, shall thereby vacate his seat in such Legislative Council.

Oath of allegiance, &c.

128. Every Member of the Senate or House of Commons of Canada shall, before taking his Seat therein, take and subscribe before the Governor-General or some Person Authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall, before taking his Seat therein, take and subscribe before the Lieutenant-Governor of the Province, or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor-General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Continuance of existing laws, courts, officers, &c.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all Legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the Union had not been made; subject nevertheless, (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Transfer of officers to Canada.

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities and Penalties, as if the Union had not been made.

Appointment of new officers.

131. Until the Parliament of Canada otherwise provides, the Governor-General-in-Council may from Time to Time appoint such Officers as the Governor-General-in-Council deems necessary or proper for the effectual Execution of this Act.

Treaty obligations.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Use of English and French languages.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

*Ontario and Quebec.*

Appointment of executive officers for Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province, the following Officers, to hold office during Pleasure, that is to say,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands and the Commissioner of Agriculture and Public Works, and, in the case of Quebec, the Solicitor-General, and may, by Order of the Lieutenant-Governor-in-Council from Time to Time prescribe the Duties of those Officers and of the several Departments over which they shall preside, or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

Powers, duties, etc., of executive officers.

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works and Minister of Agriculture and Receiver-General, by any Law, Statute or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

Great Seals.

136. Until altered by the Lieutenant-Governor-in-Council, the Great Seals of Ontario and Quebec, respectively, shall be the same or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Construction of temporary Acts.

137. The words "and from thence to the End of the then next ensuing Session of the Legislature," or words to the same effect used in any temporary Act of the Pro-

vince of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject-matter of the Act is within the powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the Act is within the powers of the same as defined by this Act.

As to errors in names.

138. From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any Deed, Writ, Process, Pleading, Document, Matter or Thing, shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union.

139. Any Proclamation under the Great Seal of the Province of Canada, issued before the Union, to take effect at a time which is subsequent to the Union, whether relating to that Province or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made.

As to issue of Proclamations after Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada, to be issued under the Great Seal of the Province of Canada, whether relating to that Province or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject-matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation, the same and the several matters and things therein proclaimed, shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

Arbitration respecting debts, &c.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

143. The Governor-General-in-Council may from Time to Time, order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof shall be admitted as Evidence. Division of records.

144. The Lieutenant-Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof. Constitution of townships in Quebec.

### X.—INTERCOLONIAL RAILWAY.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed. Duty of Government and Parliament in Canada to make Railway herein described.

### XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions Power to admit Newfoundland, &c., into the Union.

of any Order-in-Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

As to Representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the Admission of Newfoundland and Prince Edward Island or either of them, each shall be entitled to a Representation, in the Senate of Canada, of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland, the Normal Number of Senators shall be Seventy-six and their Maximum Number shall be Eighty-two; but Prince Edward Island, when admitted, shall be deemed to be comprised in the third of the three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act, for the Appointment of Three or Six additional Senators under the Direction of the Queen.

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## SCHEDULES.

### THE FIRST SCHEDULE.

*Electoral Districts of Ontario.*

A.

EXISTING ELECTORAL DIVISIONS.

COUNTIES.

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex.

RIDINGS OF COUNTIES.

10. North Riding of Lanark.
11. South Riding of Lanark.

12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.
22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

CITIES, PARTS OF CITIES AND TOWNS.

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

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B.

NEW ELECTORAL DIVISIONS.

44. The Provisional Judicial District of Algoma.

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham and Woodhouse, and with the Gore thereof.

62. The North Riding to consist of the Townships of Middleton, Townsend and Windham, and the Town of Simcoe.

63. The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Rainham, Walpole and Dunn.

64. The County of MONCK to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

65. The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby and Louth, and the Town of St. Catharines.

66. The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold and Welland.

67. The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.

68. The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of SIMCOE, divided into Two Ridings, to be called respectively the South and the North Ridings:—

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tossorontio, Mulmur, and the Village of Bradford.

70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay,

Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA, divided into Two Ridings, to be called respectively the South and North Ridings:—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.

72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of PETERBOROUGH, divided into Two Ridings, to be called respectively the West and East Ridings:—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The county of HASTINGS, divided into Three Ridings, to be called respectively the West, East and North Ridings:—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Mar-

mora and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

78. The County of LENNOX to consist of the Townships of Richmond, Adolphustown, North Fredericksburgh, South Fredericksburgh, Ernest Town and Amherst Island, and the Village of Napanee.

79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough and Bedford.

80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburgh and Howe Island and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings:—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not specially mentioned in this Schedule, is to be taken as part of the County or Riding within which it is locally situate.

THE SECOND SCHEDULE.

*Electoral Districts of Quebec specially fixed.*

COUNTIES OF

| | |
|---|---|
| Pontiac. | Shefford. |
| Ottawa. | Stanstead. |
| Argenteuil. | Compton. |
| Huntingdon. | Wolfe and Richmond. |
| Missisquoi. | Megantic. |
| Brome. | Town of Sherbrooke. |

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THE THIRD SCHEDULE.

*Provincial Public Works and Property to be the Property of Canada.*

1. Canals with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing and Munitions of War, and Lands set apart for General Public Purposes.

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THE FOURTH SCHEDULE.

*Assets to be the Property of Ontario and Quebec conjointly.*

Upper Canada Building Fund.
Lunatic Asylums.

Normal Schools.
Court Houses in: Aylmer. Montreal. Kamouraska. } Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

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### THE FIFTH SCHEDULE.

### OATH OF ALLEGIANCE.

I, *A. B.*, do swear that I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

NOTE.—*The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.*

### DECLARATION OF QUALIFICATION.

I, *A. B.*, do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the case may be*], and that I am legally or equitably seized as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seized or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the case may be*), in the Province of Nova Scotia [*or as the case may be*], of the Value of Four Thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances, due and payable out of or charged on or affecting the same, and that I have not collusively or

colourably obtained a title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the case may be*], and that my Real and Personal Property are together worth Four Thousand Dollars over and above my Debts and Liabilities.

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## B.

### 34-35 *VICTORIA.*

#### CHAP. XXVIII.

*An Act respecting the establishment of Provinces in the Dominion of Canada.*

[29*th June*, 1871.]

WHEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:—

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The British North America Act, 1871." Short Title.

2. The Parliament of Canada may from Time to Time establish new Provinces in any Territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of Laws for the peace, order and good government of such Province, and for its representation in the said Parliament. Parliament of Canada may establish new Provinces and provide for the constitution, &c., thereof.

3. The Parliament of Canada may from Time to Time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect Alteration of limits of Provinces.

and operation of any such increase or diminution or alteration of Territory in relation to any Province affected thereby.

Parliament of Canada may legislate for any territory not included in a Province.

4. The Parliament of Canada may from Time to Time make provision for the administration, peace, order, and good government of any Territory not for the time being included in any Province.

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict. (Canadian) cap. 3, 33 V. (Canadian), cap. 3.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively: "An Act for the tem-"porary government of Rupert's Land and the North "Western Territory when united with Canada," and "An "Act to amend and continue the Act thirty-two and "thirty-three Victoria, chapter three, and to establish and "provide for the government of the Province of Manitoba," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

Limitation of powers of Parliament of Canada to legislate for an established Province.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from Time to Time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

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## C.

### 38-39 *VICTORIA.*

#### CHAP. XXXVIII.

*An Act to remove certain doubts with respect to the powers of the Parliament of Canada under Section Eighteen of the British North America Act, 1867.*

[19*th July*, 1875.

30 and 31 Vict., c. 3.

WHEREAS by Section Eighteen of the British North America Act, 1867, it is provided as follows:—

"The privileges, immunities and powers to be held, "enjoyed and exercised by the Senate and by the House "of Commons, and by the Members thereof respectively,

"shall be such as are from time to time defined by Act of "the Parliament of Canada, but so that the same shall "never exceed those at the passing of this Act, held, "enjoyed and exercised by the Commons House of Par- "liament of the United Kingdom of Great Britain and "Ireland and by the members thereof."

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities: and it is expedient to remove such doubts:

Be it, therefore, enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Substitution of new Section for Section 18 of 30 & 31 Vict., c. 3.

1. Section eighteen of the British North America Act, 1867, is hereby repealed without prejudice to anything done under that action, and the following section shall be substituted for the section so repealed.

The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof, respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

Confirmation of Act of Canadian Parliament.

2. The Act of the Parliament of Canada passed in the thirty-first year of the Reign of Her present Majesty, chapter twenty-four, intituled "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament," shall be deemed to be valid, and to have been valid as from the date at which the Royal assent was given thereto by the Governor-General of the Dominion of Canada.

3. This Act may be cited as "The Parliament of Canada Act, 1875."

## D.

### 49-50 *VICTORIA.*

#### CHAP. XXXV.

*An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.*

[*25th June*, 1886.]

A.D. 1886. WHEREAS it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada or either of them, of any Territory which for the time being forms part of the Dominion of Canada, but is not included in any province.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Provision by Parliament of Canada for representation of Territories.

1. The Parliament of Canada may, from time to time, make provisions for the representation in the Senate and House of Commons of Canada, or in either of them, of any Territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

Effect of Acts of Parliament of Canada.

2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

34 and 35 Victoria, c. 28.

30 and 31 Victoria, c. 3.

3. This Act may be cited as the British North America Act, 1886. Short title and construction.

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